Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

ROSELLA E. BURNS, *et al.*,

Petitioners,

vs.

STONE FOREST INDUSTRIES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 5(a)(1)(A) of the Workers Adjustment and Retraining Notification Act, 29 U.S.C. § 2104(a)(1)(A), which provides that an employer who orders a plant closing or mass layoff in violation of the Act's sixty day notice requirement is "liable to each aggrieved employee . . . for . . . back pay for each day of violation," entitles an aggrieved employee to damages for each calendar day of the violation period or only for wages for each work day of the violation period.

LIST OF PARTIES

In addition to the parties named in the caption, the following are also petitioners: Timothy Ray Keener; Ted-Hyun Kim; Emil Martin; Belle Mcgovern; Brenda L. Miotke; Keith Miotke; William Parker; Lavern Rhodes; Orrin Savage; Larry Vetter.

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Rosella E. Burns, Timothy Ray Keener, Ted-Hyun Kim, Emil Martin, Belle McGovern, Brenda L. Miotke, Keith Miotke, William Parker, Lavern Rhodes, Orrin Savage, and Larry Vetter, on behalf of themselves and others similarly situated, hereby petition this Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Burns v. Stone Forest Industries Inc.*, 147 F.3d 1182 (9th Cir. 1998).

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Ninth Circuit is reprinted in Petitioners' Appendix ("Pet. App."), at 1a. The Opinion of that court is reported at 147 F.3d 1182 (9th Cir. 1998), and is reprinted at Pet. App. at 2a. The Judgement of the district court is reprinted at Pet. App. 12a. The Order of the district court adopting the Magistrate Judge's Findings and Recommendations is reprinted at Pet. App. 13a. The Magistrate Judge's Findings and Recommendation is reprinted at Pet. App. 15a.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its Order and Judgment on July 14, 1998. This Petition was filed within 90 days, thereby giving this Court jurisdiction to review pursuant to 28 U.S.C. § 1254(1) (1970).

STATUTORY PROVISIONS INVOLVED

The relevant portion of the Worker Adjustment and Retraining Notification Act ("WARN" or "the Act"), provides:

> (a) Civil Actions Against Employers
>
> (1) Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for —
>
> (A) back pay for *each day of violation* at a rate of compensation not less than the higher of —

> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
>
> (ii) the final regular rate received by such employee;
>
> * * *
>
> Such liability shall be *calculated for the period of the violation, up to a maximum of 60 days*, but in no event for more than one-half of the number of days the employee was employed by the employer.

9 U.S.C. § 2104(a)(1) (1988) (emphasis added).

STATEMENT OF THE CASE

On September 26, 1994, Respondent Stone Forest Industries ("Stone Forest"), informed workers at its Albany, Oregon plywood mill that the facility would permanently close its doors two days later. Pet. App. at 16a. During the sixty day period following the closing, Respondent, in apparent recognition of its clear violation of the Act — a violation which the district court later confirmed — continued providing its employees coverage under their benefits plan and paid each employee, "on regular paydays," for each day he or she *would have worked during the sixty day period. Id.* at 16a, 21a-22a.

After the conclusion of the sixty day period, Petitioners timely filed a class action complaint, alleging that WARN's damages and enforcement provision, 29 U.S.C. § 2104, entitled them to damages equal to back pay and benefits for each *calendar day* of Respondent's violation of the Act's sixty day advance notice requirement. *Id.* at 15a-17a. Respondent thereafter moved for summary judgment, arguing, *inter alia*, that it complied with the Act's notice requirements by providing wages and benefits for each of the forty-two days of the violation period on which its employees would have otherwise worked. *Id.* at 15a-16a, and 22a. Petitioners' then cross-moved for partial summary judgment on the issue. *Id.* 15a-16a.

After finding that Respondent "clearly violated the notice provision" of the Act, Pet. App. at 21a-22a, the Magistrate Judge concluded that Respondent was entitled to summary judgment because its payment of 42 days wages and benefits offset its liability under the Act. Pet. App. at 31a-32a. The Magistrate Judge began by finding that the phrase " 'back pay for each day of the violation' was susceptible to more than one reasonable interpretation," *id.* at 24a-25a, and that the legislative history supported both the calendar and work day approach.[1] Faced with these conflicting findings, the Magistrate Judge held that, while both approaches "have merit . . . , the workday approach better reflects the [Act's] statutory purpose." *Id.* at 27a. After *de novo* review, the district court adopted the Magistrate Judge's Findings and Recommendation and granted Respondent's motion for summary judgment. *Id.* at 13a-14a.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit which affirmed the district court's decision. Specifically, the court of appeals, like the district court, found that the phrase "back pay for each day of the violation" was susceptible to interpretations that supported both the work day and calendar day approach to calculating damages under the Act. *Id.* at 7a. The court then turned to the legislative history, but found ambiguity there arising from a purported conflict between two oft-cited congressional reports.[2] Given this purported ambiguity in the legislative history, the court found that the "preferable way to resolve [the] linguistic ambiguity [of the Act was] to evaluate the alternative readings in light of the" Act's purpose.[3] *Id.* at 8a.

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1. " . . . Congress' attempts to clarify the damage provision remain susceptible to both interpretations." Pet. App. at 27a.

2. Senate Report, S. Rep. No. 62, 100th Congress, 1st Sess. 24 (1987), commenting on an earlier version of the Act, that supported the work day approach; and a later House Conference Report, H.R. Conf. Rep. No. 100-576, 100th Cong., 2nd Sess. 1052-1053 (1988), commenting on the final version of the Act, that supported the calendar day approach. Pet. App. at 26a-27a.

3. The Ninth Circuit's distinction between the "legislative history," on the one hand, and the "evaluat[ion] . . . in light of the purpose of the statute," Pet. App. at 8a, on the other, creates a false dichotomy. Regardless of the

(Cont'd)

Ignoring the significant non-compensatory and prophylactic purposes of the Act, the court found that WARN "is a wage workers' equivalent of business interruption insurance" *id.*, designed to provide "a two month uninterrupted income stream facilitating a job search." *Id.* at 9a.[4] Relying on this erroneous interpretation of the Act, the court held that employers who violate the Act are required only to pay aggrieved employees a *day's wages for each day during the violation period on which the employee would have worked. Id.* The court also concluded that it did "not make sense to require the company to pay [a worker] for calendar days without regard to work days, because the stream of income would be arbitrarily long for some workers and short for others." *Id.* This conclusion was based on damage calculations performed on a hypothetical scenario[5] which was soundly rejected by both the Secretary of Labor[6] and the Third Circuit,[7] but relied upon by three other circuit courts in adopting the work day approach.[8] *Id.*

(Cont'd)
apparent conflict between these two excerpts from the legislative history, the underlying purpose of the Act is fully understood *only* by examining the legislative history in its full context. See further discussion below, *infra*, at 14-17.

4. This analogy to "business interruption insurance" flies in the face of Congress' unequivocal rejection of a proposed amendment to the WARN Act introduced by Senator Quayle. The amendment would have allowed employers to comply with the Act by providing severance pay in lieu of notice. 134 Cong. Rec. 15,926 (1988). See further discussion of this proposed amendment, *infra*, at 17.

5. This hypothetical scenario depicts a situation whereby part-time workers, based on their daily rate of pay, would receive a higher damage award than would full time workers under the calendar day approach. The court's erroneous analytical reliance on this hypothetical is discussed in detail *infra*, at 20-22.

6. Amicus Brief Submitted by the Department of Labor at the request of this Court in *Carpenters Dist. Council v. Dillard Dept. Stores*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995), at Pet. App. 34a-55a.

7. *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39, 43, n.6, (3rd Cir. 1993).

8. *See Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797, 800 (8th Cir.
(Cont'd)

The court also rejected the calendar day approach because it believed it would financially pressure a company "in a way that would hamper the workers' opportunities to search for new jobs." *Id.* at 9a-10a. Completely ignoring the broad statutory exceptions to liability under the Act for employers who are unable to provide the required advance notice, 29 U.S.C. § 2102(b), the court found that the calendar day approach would pressure employers into avoiding liability ". . . by requiring workers to come in every work day during the 60 day notice period, and tell them to sit and waste time in a plant that produced nothing." *Id.* at 9a.

REASONS FOR GRANTING THE WRIT

This case involves a conflict in statutory interpretation among six courts of appeals, several district courts, and the Secretary of Labor, whose interpretation of the statutory language in question, which was proffered at the request of this Court in *Carpenters Dist. Council v. Dillard Dep't. Stores,* 15 F.3d 1275 (5th Cir. 1994) *cert. denied,* 513 U.S. 1126 (1995), is directly at odds with that adopted by the Ninth Circuit here. The conflict turns on a significant and well defined issue of federal statutory interpretation that arises in every WARN case. It directly raises concerns about the inequitable treatment of aggrieved employees under the Act and uncertainty in the interpretation and application of various provisions of the Act. At bottom, the disagreement turns on the very purpose of the Act itself. The fundamental question is whether Congress intended the Act to ensure that workers receive timely notice of plant closings and mass layoffs to facilitate critical, geographically centralized government-assisted retraining and readjustment assistance, or whether the Act was merely meant to compensate dislocated workers by providing them with back pay in lieu of notice, placement assistance and retraining. The former interpretation is endorsed by the Third Circuit, the Congress that enacted WARN, and the Department of Labor (the "DOL"), which was charged with promulgating regulations under the Act. The latter interpretation is

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1998), *petition for writ of certiorari filed* July 6, 1998, Docket No. 98-77; *Saxion v. Titan-C-Mfg.*, 86 F.3d 553, 560 (6th Cir. 1996); and *Carpenters Dist. Council v. Dillard Dep't. Stores*, 15 F.3d 1275, 1285 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

the result of the misguided readings of the Act by the Fifth, Sixth, Eighth, Ninth and Tenth Circuits, readings which the plain language, structure and purpose of the Act unambiguously reject, and which Congress, in passing the Act, also flatly rejected.

The need to resolve this conflict has never been more pressing. Just eight days after petitioners filed their petition for writ of *certiorari* seeking to challenge the Eighth Circuit's decision on the identical issue in *Breedlove v. Earthgrains Baking Companies, Inc., d/b/a/ Campbell Taggart Baking Company, Inc.*, 140 F.3d 797 (8th Cir. 1998), which petition is still pending before this Court (Docket No. 98-77, filed July 6, 1998), the Ninth Circuit handed down the decision that is the subject of this petition. The Ninth Circuit's decision is perhaps the most egregious decision on the issue to date in that it so fundamentally misconstrues the purpose of the Act that it will likely cause further misinterpretations of other provisions of the Act.

Due to the fact that: (i) the issue decided by the Ninth Circuit here and the Eighth Circuit in *Breedlove* is identical; (ii) Respondent in *Breedlove* relied heavily on the Ninth Circuit's decision here in challenging that petition; and (iii) the rationale supporting the identical conclusion in both cases differs in significant respects, Petitioners here and in *Breedlove* have contemporaneously filed herewith a joint motion under the *Burns* caption to consolidate the two writs for consideration by this Court. Finally, the arguments set forth below are also intended to serve as the Petitioners' Reply to the Respondent's Brief in Opposition in *Breedlove*.[9]

DISCUSSION

WARN provides, in pertinent part, that, "[a]ny employer who orders a plant closing [in violation of the Act] . . . shall be liable . . . for *back pay* for *each day* of violation. . . ." 29 U.S.C. § 2104(a)(1)(A) (1988) (emphasis added). The disagreement among the courts of appeals turns on whether Congress intended the term "back pay,"

9. Petitioners' Counsel of Record in *Breedlove*, the NLG/Maurice and Jane Sugar Law Center for Economic and Social Justice, are also Petitioners' Counsel of Record here. Counsel has filed a formal Reply in *Breedlove* contemporaneous herewith, which Reply refers this Court to particular portions of this petition.

read in conjunction with the phrase, "each day of violation," to be a label for the daily penalty rate designed to deter conduct that violates the Act, or whether Congress intended to limit aggrieved workers' remedy to purely compensatory relief for the loss of wages only. At the heart of this disagreement is whether WARN was intended to ensure advanced notice and centralized retraining and placement assistance to dislocated workers, or whether, as the Ninth Circuit erroneously held, it is merely the " 'wage workers' equivalent of business interruption insurance." Pet. App. at 8a.

Under the first approach, damages under the Act are just that: a penalty that redresses the wrong of denying workers advance notice and retraining and placement assistance that is assessed for each *calendar day* of the employer's violation of the Act. If, however, the Act is held to be merely a form of 'business interruption insurance,' as held by the Ninth Circuit, then the relief afforded to dislocated workers is simply compensation in the form of wages for each day of the violation *on which they would have worked.* Given a full sixty day violation of the Act, the calendar day calculation yields sixty days of damages, while the work day approach yields just forty-two — an approximate 30% disparity in recovery.

The Ninth Circuit has now joined four other circuits following the work day approach. *Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797 (8th Cir. 1998), *petition for cert. filed*, July 6, 1998, Docket No. 98-77; *Saxion v. Titan-C-Mfg.*, 86 F.3d 553 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996); *Carpenters Dist. Council v. Dillard Dep't. Stores*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). The Third Circuit, on the other hand, has adopted the calendar day approach, *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994), *reh'g denied*, 511 U.S. 1048 (1994), agreeing in full with the interpretation of the Act urged by the DOL, *see* Pet. App. at 34a-55a,[10] which was granted express authority in the Act to prescribe regulations thereunder. 29 U.S.C. § 2107.

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10. See *infra* 12-14, for a discussion of this Court's invitation to the DOL to submit an Amicus Brief in *Carpenters* on the proper interpretation of the Act, and the deference due to the DOL's interpretation as set forth in that brief.

The remaining seven courts of appeals will eventually have to choose between these conflicting interpretations of the Act and its purpose.[11] Not surprisingly, cases raising the issue still divide the lower courts. Compare: *Sinischalchi v. Shop-Rite Supermarkets, Inc.*, 903 F. Supp. 182 (D. Mass. 1995), and *United Electrical Workers v. Maxim, Inc.*, 5 IER Cases (BNA) 629 (D. Mass. 1990), which adopt the calendar day approach, with *Local 1239 v. Allsteel, Inc.*, 1998 W.L. 299820 (N.D. Ill., June 2, 1998); *Ass'n of Western Pulp and Paper Workers v. Grays Harbor Paper Co.*, No. C93-5226B, 1994 U.S. Dist. LEXIS 13094 (W.D. Wash. 1994); *Washington v. Aircap Indus.*, 860 F. Supp. 307 (D.S.C. 1994); and *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1292 (E.D. Tenn. 1990), *amended in part*, 753 F. Supp. 218 (E.D. Tenn. 1990), which endorse the work day computation.

A ruling by this Court will forestall undue hardships on employees and employers whose legal rights and obligations remain uncertain, promote consistent interpretation and application of an important federal statute, and avoid divisive and unnecessary litigation. Perhaps most importantly, as the DOL made clear: "Uniform application of the WARN Act is important if the Act is to fulfill its prophylactic purpose." Pet. App. at 43a. Thus, this petition for writ of *certiorari*, together with that in *Breedlove, supra,* should be granted.

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11. The fact that the conflict among the circuits is asymmetric has never barred review by this Court. In fact, this Court has granted *certiorari* in cases on the basis of an inter-circuit conflict involving 1 circuit disagreeing with 5 or more circuits. *See, e.g., Musick, Peeler & Garret v. Employers Insurance of Wausau*, 508 U.S. 286, 289 (1993) (5 to 1 split among circuits); *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 219 & 219 at n. 5 (1978) (7 to 1 split among circuits). The fact that the opinions of the majority of circuits is also at odds with the DOL's own interpretation of the Act also compels review by this Court. *See infra* pp 12-18, 20-22.

I.

THE INTER-CIRCUIT CONFLICT UNDERMINES WARN'S NATIONAL POLICY AS ARTICULATED BY CONGRESS, THE STATUTORY SCHEME AND THE SECRETARY OF LABOR, AND FOSTERS INEQUITABLE TREATMENT OF PLAINTIFFS, MISGUIDED INTERPRETATIONS OF THE ACT, AND UNCERTAINTY FOR LITIGANTS

Passage of the WARN Act in 1988 was the end result of a protracted 15-year Congressional effort to enact a law requiring employers to provide advance notice to their workers of foreseeable and impending plant closings and mass layoffs.[12] The Act was Congress' response to the accelerating 'de-industrialization' of the American economy, the burgeoning numbers of dislocated workers in need of retraining and other assistance, and the devastating impact of plant closings and mass layoffs at the community level.[13] The legislature's intent was to craft a *national* policy to deal with the nationwide problem of plant closings and mass layoffs.[14] By promoting the inequitable treatment of plaintiffs in different circuits, the proliferation of misreadings of WARN and its purpose, and uncertainty for litigants in undecided circuits, the division among the courts of appeals frustrates Congress' attempt to create a uniform national plant closing and mass layoff policy.

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12. *See* Richard W. McHugh, *Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice*, 14 Berkeley J. Employment & Lab. L. 1, 5-13, 14-16 (1993); Jessica L. Stein, *The Worker Adjustment Retraining and Notification Act (WARN): What Is the Meaning Behind the Language?*, 19 Seton Hall Legis. J. 648, 648-658 (1995); Christopher P. Yost, *The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?*, 38 Cath. U.L. Rev. 675, 688-692 (1989).

13. *See* McHugh, *supra* at 3-10; Stein, *supra* at 648-655; Yost, *supra* at 675-682.

14. *Cf.* 134 Cong. Rec. S 8373 (daily ed. Jun. 22, 1988) (statement of Sen. Byrd), *reprinted in* 100TH CONG., LEGISLATIVE HISTORY OF THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT, 1988, at 180-182 (Comm. Print 1990); *see* McHugh, *supra* at 1-10, 13-16; Stein, *supra* at 648-658; Yost, *supra* at 675-82, 690-92.

A. The Split Among The Courts Of Appeals Subjects Plaintiffs To Inequitable Treatment.

An inter-circuit conflict is intolerable and ripe for review when it raises an important question of federal law and policy unsettled by this Court. *See* Sup. Ct. R. 10(c); Stewart A. Baker, *Symposium on Supreme Court Advocacy*, 33 Cath. U. L. Rev. 611 (1984). Conflicts resulting in the unfair distribution of benefits or penalties to litigants in different circuits implicate crucial concerns about federal law and policy. *Cf.* Judicial Improvements Act of 1990 § 302(a)(b), Pub. L. No. 101-650, 104 Stat. 5089 (1990) (authorizing study of unresolved inter-circuit conflicts and suggesting particular attention to splits conferring federal benefits on litigants in some circuits and not others); *see also* Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. Pitt. L. Rev. 693, 757 (1995). Ensuring that federal law is interpreted and applied consistently, and not in a manner that deprives some citizens of the intended benefits of a national policy, is one of this Court's traditional responsibilities. *Cf.* Sup. Ct. R. 10(a)(c).

To date, even among the five courts of appeals which have found in favor of the work day approach, there exists inconsistent interpretations of the national policy embodied in, and purpose of WARN. Compare, for example, *Carpenters Dist. Council v. Dillard Dep't. Stores*, 15 F.3d 1275, 1283-1285 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (purpose of the Act is to provide workers with notice of impending employment loss or to compensate employees for wages they would have earned had proper notice been given), and *Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797, 801 (8th Cir. 1998), *petition for cert. filed* July 6, 1998 (while compensatory in nature, the WARN Act is also quasi-punitive because violating employers must pay wages for work not performed). Now with the Ninth Circuit's ruling in this case, yet another layer is added to this interpretive thicket. The Ninth Circuit held, without reference to any supporting authority, that WARN's purpose is simply to provide terminated employees with two months of continued pay and benefits so that they can support themselves while seeking new employment. Pet. App. at 9a. The court thus rejected even the *Dillard* and *Breedlove* courts' modest fidelity to the Act's notice provision, and *sua sponte* converted WARN into

> . . . a *wage workers' equivalent of business interruption insurance* . . . [which] protects a worker from being told on payday that the plant is closing . . . though he has to buy groceries for his family . . . and make a mortgage payment the next week.

Id. at 8a (emphasis added). Thus, for the Ninth Circuit, the statutory purpose of the Act is to ". . . provid[e] a two-month un-interrupted income stream facilitating a job search." *Id.* at 9a. Nothing could be further from the express purpose of the Act.

The demonstrable inaccuracy of this interpretation aside (which is discussed more fully below), the Ninth Circuit's ruling is troubling simply because it represents yet another step away from *any* consistent reading of the Act among the courts of appeals.[15] In thus contributing to the interpretive divide separating the circuits, the Ninth Circuit has helped guarantee the confused development of the law.

Because the courts of appeals are unable to reach a consensus on the Congressional policy underlying the Act, successful plaintiffs in the Third Circuit recover approximately 30% more in damages than plaintiffs in the remaining decided circuits for a full, sixty day violation of WARN's notice provision. Thus, aggrieved employees in those circuits which have adopted the work day approach are denied a significant portion of a remedy elsewhere available under federal law merely because they were not employed, or able to bring suit in the Third Circuit. Perhaps more importantly, because the work day approach provides no real incentive for employers to comply with the Act (*see infra* p. 16), employees in these circuits are less likely to receive the advance notice and centralized retraining and placement assistance that was the very purpose of the Act. Thus, rather than fulfill what the DOL described as WARN's "prophylactic purpose,"

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15. The interpretive inconsistency is even more pronounced, of course, when considering *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39, 42-44 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994), *reh'g denied*, 511 U.S. 1048 (1994) (plain language and scheme of WARN, together with canons of statutory construction, compel conclusion that recovery under WARN is damages and should be awarded for each calendar day of notice violation).

of ensuring advance notice, Pet. App. at 43a, the Act is reduced to the Ninth Circuit's vision of mere unemployment insurance. *Id.* at 8a.

The inter-circuit split thus results in the disparate, inequitable treatment of plaintiffs on grounds that are arbitrary and destructive of a sound public policy's commitment to uniformity and fairness in federal law. Unless the dispute is resolved by this Court, plaintiffs in different circuits will be treated inequitably.[16] Moreover, Congress' intention of creating a national mechanism for redressing the injuries visited upon dislocated workers who do not receive adequate notice of their impending loss of livelihood will be frustrated.

B. The Statutory Interpretation Of WARN By The Secretary of Labor Is Entitled to Substantial Deference By This Court.

In 1995, the plaintiffs in *Carpenters, supra,* filed a petition for a writ of *certiorari* challenging the Fifth Circuit's adoption of the work day approach. This Court, in considering that petition during a time when the only other appellate adjudication of this issue was from the Third Circuit (reflecting a split among only 2 circuits), requested that the Solicitor General's office submit an amicus brief on this issue, which it did in conjunction with the Secretary and Department of Labor. In that amicus brief, reprinted in full beginning at Pet. App. 34a, and hereinafter referred to as the "DOL Amicus Brief," the Secretary urged this Court to grant the petition, reverse the decision of the Fifth Circuit and adopt the calendar day approach.

For the reasons that follow, and because the question presented in *Carpenters* is identical to that presented here and in *Breedlove*, the Secretary of Labor's position on the interpretation of the Act's purpose

16. Given the broad language and scope of the Third Circuit's calendar day decision in *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993), and the significant procedural and policy impediments to the reconsideration of the issue by that court, *see* U.S.C. Ct. App. 3rd Cir., Appx. 9.2, *et seq.* (1998), reversal of the Third Circuit's position is unlikely. Thus, a definitive ruling on the issue by this Court is the only way to eliminate the significant disparity in the amount of damages awarded in the different circuits and the forum shopping attendant thereto, and end the continued sluggish and inefficient procession of litigation on the issue through the judicial systems of the remaining undecided circuits.

and computation of damages provision, as set forth in DOL Amicus Brief, should be granted substantial deference by this Court.

In *Pauley v. Bethenergy Mines, Inc., et al.*, 501 U.S. 680 (1991), this Court held:

> Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches. * * * [T]he resolution of ambiguity in statutory text is often more a question of policy than law. *When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited. It is precisely this recognition that informs our determination that deference to the Secretary is appropriate here.*

Id. at 696 (emphasis added) (citations omitted). *Cf. Gardebring v. Jenkins*, 485 U.S. 415, 429-430 (1988) (agency's interpretation of its own regulation is entitled to deference even when that interpretation had not been asserted prior to the lawsuit in question).

Similarly, WARN expressly delegates authority to the DOL to "prescribe such regulations as may be necessary to carry out this Act," 29 U.S.C. § 2107(a), which it did in 1989. *See* 20 C.F.R. § 639 *et seq.* Moreover, each court that has adopted the work day approach has done so because of purported ambiguities in the Act's statutory text, and has turned, albeit incorrectly, to the policy behind, and purpose of the Act for guidance.[17] Thus, if there is an 'interpretive gap' in the statutory

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17. Pet. App. at 8a-9a; *Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797, 800, 801 (8th Cir. 1998), *petition for writ of certiorari filed* July 6, 1998, Docket No. 98-77; *Saxion v. Titan-C-Mfg.*, 86 F.3d 553, 560-61 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757, 771-72 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996); *Carpenters Dist. Council v. Dillard Dep't. Stores*, 15 F.3d 1275, 1283-85 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

text as employers in each of these cases have argued, then, given that policymaking authority was delegated under the Act to the DOL, the holding in *Pauley* compels deference to the interpretation of the Act proffered by the DOL. Deference here is particularly appropriate given that the DOL Amicus Brief sets forth the Secretary's *position* on the interpretation of the phrase "back pay for each day of violation." DOL Amicus Brief at Pet. App. 49a, n. 8. Thus, the Secretary was not merely offering advice, but rather was taking a *position* that the DOL endorsed.[18] While particular statutory interpretations and recitations of the policy underlying WARN made by the Secretary are referred to below, the full weight and authority of the DOL Amicus Brief *in toto* should be considered, and granted deference to by this Court in considering this petition.

C. The Ninth Circuit Misconstrued The Purpose Of WARN.

As an initial matter, the Act, and the relief provided thereunder, must be construed according to its manifestly punitive and deterrent purpose.[19] The principle purpose of WARN is to provide affected employees, state dislocated workers units, local governmental entities, and, where applicable, union officials, with sixty days advance notice of a plant closing or mass layoff, in order to provide the best opportunity for the affected government units and unions to assist workers with readjustment assistance and re-employment while the business is still in operation.[20] Congress thought that this goal could

18. That the Secretary would have to formulate a position on statutory interpretation *after* the promulgation of the regulations under the Act is no surprise. Indeed, at the outset of the regulations, the DOL made it plain that the regulations were intended to establish "broad guidelines," and that it recognized that the regulations could not "address the multitude of industry and company specific situations in which advance notice will be given." 20 C.F.R. § 639.1(b).

19. "When interpreting a statute, the courts will not look merely to the particular clause in which the general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law." *Kokoska v. Belford*, 417 U.S. 642, 650, *reh'g denied*, 419 U.S. 886 (1974). *See also, United Food and Commercial Workers v. Brown*, 517 U.S. 544 (1996).

20. The main vehicle by which this is to be accomplished is the Economic Dislocation and Worker Adjustment Assistance Act ("EDWAA"), 29 U.S.C.

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not be realized unless workers had collective access to the facilities of a functioning operation. As the Act's sponsor Senator Metzenbaum explained:

> The important element in our bill is to *see to it that people have the time to seek readjustment and retraining while they are working. . . . We are not seeking to get workers paid because their plant is closing. . . .*

134 Cong. Rec. 15,928 (1988) (emphasis added). The utility of having the plant as a place for workers and state agencies to congregate and address the crisis of imminent job loss is what makes advance notice central. Quoting the Secretary of Labor's Task Force, Senator Metzenbaum stated:

> Advance notice is essential because notice facilitates greater participation [in retraining, counseling, and placement programs] and because a functioning plant is perhaps the programs' single most important resource.

Id. This statement of the fundamental goal of the Act was not mere speculation, but based on hard empirical data. Senator Metzenbaum expressly based his statement on a General Motors study demonstrating that, where a functioning plant is available for their use, 85% of employees to be terminated took part in retraining and adjustment programs. *Id.* Where there was no advanced notice and use of a centralized facility, only 15% of workers took part in such programs. *Id.* Congress, concerned about this striking disparity in participation, and determined to provide for effective retraining and placement programs, designed WARN to require the crucial advance notice — not pay for missed days of work in lieu of that notice. The very title of the Act itself, the Worker Adjustment and Retraining Notification Act, clearly articulates Congress' intent.

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§§ 1651-1662b (1988). EDWAA provides adjustment services to dislocated workers by linking state dislocated worker units, local governments, unions and employers. There is also an opportunity for employees to seek new employment, or retraining and income support through either the Trade Adjustment Assistance program, 19 U.S.C. §§ 2271-2322 (1975), or the NAFTA Transitional Adjustment Assistance program, 19 U.S.C § 2331 (1993).

The Ninth Circuit, as well as other courts that have adopted the work day approach that permits employers to willingly withhold advance notice, shut their doors and then pay "business interruption insurance" to their workers in lieu of notice, have effectively undermined this Congressional intent. The work day approach, in the end, only requires the violating employer to pay the same amount to its workers as it would have had proper notice been given. Thus, there is thus no real penalty for non-compliance and no incentive to comply. *Damages awarded under the work day approach also fail to redress the principal wrong visited upon employees: lack of advance notice and centralized retraining and placement assistance.*

The work day view of WARN Act damages as compensatory relief is also inconsistent with the recent description by this Court of WARN Act damages as "penalties."[21] Compensatory relief is not a penalty; it is a make-whole remedy. Dan B. Dobbs, The Law of Remedies, § 3.1 (1973). Damages as penalties are meant "to punish and to set an example that will deter similar conduct in the future." *Id.* at § 3.9. Only the calendar day method, which requires an employer who fails to give notice to employees to pay its employees for "each day" of the violation, provides employers with an incentive to comply with the Act by penalizing them for non-compliance.

The Ninth Circuit's holding inflicts even greater injury on Congress' aims than previous work day decisions because it completely ignores the fundamental purpose of the Act: to require employers to give advance notice to their employees of an impending plant closing or mass layoff. It also completely disregards the inextricable relationship between this notice requirement and the Congressional goal of centralized, pre-termination government-

21. "An employer who violates the notice provisions [of the Act] is liable *for penalties by way of a civil action. . . .*" *North Star Steel*, 515 U.S. 29, 31 (1995) (emphasis added). Respondent's contention in *Breedlove* that the penalties the Court referred to above was the 'civil action' itself is nonsensical. (Respondent's Brief in Opposition in *Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797 (8th Cir. 1998), *petition for writ of certiorari filed* July 6, 1998, Docket No. 98-77, ("*Breedlove* Brief in Opposition"), at 14. The language cited makes clear that the Court was simply setting forth the statutory scheme of the Act, and that employers who violate the Act are liable for penalties assessed thereunder.

assisted retraining and placement assistance for dislocated workers. Instead of respecting Congress' intent, the Ninth Circuit erroneously decided that the legislature was primarily concerned with ". . . providing a two-month uninterrupted income stream" to workers in order to facilitate *their own personal search* for new employment. Pet. App. at 9a. It thus rewrote the law, transforming WARN into a mandatory severance package for the hourly worker — a construction of the Act that Congress itself emphatically rejected. During the legislative debate, Senator Quayle offered an amendment that would have allowed "60 days severance pay in lieu of notice."[22] Arguing against the amendment, which was ultimately rejected, Senator Metzenbaum stated that the Act:

> . . . is about *giving notice*. It is *not* a mandatory severance bill. . . . * * * As stated by the National Academy of Sciences, . . . it is the notice that is essential to successful worker adjustment programs.

134 Cong. Rec. at 15,928 (June 24, 1988).

The Ninth Circuit thus ignored the national plant closing and mass layoff policy crafted by Congress, and rendered yet another misguided interpretation of the purpose of, and policy underlying the Act on which courts will erroneously rely both in this context and in others.

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22. 134 Cong. Rec. 15,926 (June 24, 1988). The DOL noted the following peculiarity in the rejected Quayle amendment that, in and of itself, shows that Congress was not considering a work day calculation:

> Even the Quayle amendment would have provided that the severance pay would be in 'an amount equal to the employee's compensation as computed under section [5(a)(1)] multiplied by the number of days that the requisite notice was not given,' . . . a formulation that would have made back pay under the Act awardable for each calendar day of the violation, whether or not an aggrieved employee would have worked and earned wages.

DOL Amicus Brief at Pet. App. 47a, n. 7 (citations omitted).

D. The Inter-Circuit Conflict Promotes Uncertainty For Litigants In Undecided Circuits And Forum Shopping.

An inter-circuit conflict is intolerable and ripe for review when it is outcome-determinative or unfairly grants different benefits to, or imposes different penalties on, litigants in the various circuits in cases arising from similar facts. *Cf.* Judicial Improvements Act of 1990 § 302(a)(b), Pub. L. No. 101-650, 104 Stat. 5089 (1990) (authorizing study of unresolved inter-circuit conflicts, and suggesting particular attention to conflicts conferring federal benefits to litigants in some circuits, while denying those benefits to litigants in other circuits); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. Pitt. L. Rev. 693, 757, 760 (1995). Moreover, forum shopping resulting from an inter-circuit conflict also compels review.

1. The Inter-Circuit Conflict is Outcome-Determinative and Promotes Abuse of the Act's Good Faith Exception.

The significantly varying damage awards resulting from the inter-circuit split are often 'outcome-determinative' for aggrieved employees in undecided circuits because the work day formula encourages WARN violators to preempt potential lawsuits by compensating terminated workers for work days in the violation period. By assuming work day liability, the violating employer provides itself with a plausible argument that it has fulfilled its statutory obligations, while hoping to placate aggrieved workers who might otherwise initiate litigation. As long as there is no definitive ruling on this issue, potential plaintiffs in undecided circuits will fall prey to this tactic because they will not be able to predict whether a successful lawsuit would result in a calendar day recovery. Faced with the daunting task of protracted litigation with no guarantee of success, cost-benefit analyses of WARN lawsuits by potential plaintiffs will frequently weigh heavily against risking their scarce financial resources for uncertain outcomes.

The outcome-determinative nature of this tactic is substantially more significant when one considers that the Act itself provides for a reduction or total elimination of damages *after a finding of liability*

where the employer can demonstrate that it reasonably believed that it was not violating the Act. 29 U.S.C. § 2104(a)(4). Thus, employers can rest assured that, even if litigation is pursued and the calendar day approach is adopted, the significant reduction or total elimination of damages assessed is likely because the employer can point to decisions adopting the work day approach to support its contention that it in good faith believed it was not violating the Act. *See, e.g., Frymire v. Ampex Corp.*, 61 F.3d 757, 769 (10th Cir. 1995) (remand to reduce liability based on good faith with instruction that court below should 'carefully consider' employer's pay in lieu of notice and circuit court's decision on the calendar day/work day issue), *cert. dismissed*, 517 U.S. 1182 (1996); Magistrate Judge's Findings and Recommendation at Pet. App. 32a, n. 8 (same).

2. *Forum Shopping.*

The DOL accurately summarized how, in light of the Act's liberal venue provision,[23] the inter-circuit conflict on this issue is ". . . an invitation to widespread forum shopping."

> For instance, an employee who is terminated as the result of a plant shut-down in Louisiana, without the notice required by the WARN Act, could bring suit in the more favorable Third Circuit if the employer happens to "transact[ ] business" in Pennsylvania, while one whose employer's only business is within Louisiana could not.

DOL Amicus Brief at Pet. App. 54a, n. 13. Review and determination of the issue by the Court is the only antidote to forum shopping, which, if more courts adopt the calendar day approach, will increasingly become more widespread.

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23. The venue provision, 29 U.S.C. § 2104(a)(5), allows suit in "any district in which the violation is alleged to have occurred, *or in which the employer transacts business*." (emphasis added).

II.

THE NINTH CIRCUIT'S DECISION WORSENS THE CONSEQUENCES OF THE INTER-CIRCUIT SPLIT BY ENCOURAGING FURTHER ERRONEOUS JUDICIAL INTERPRETATIONS OF WARN

In its decision, the Ninth Circuit makes three mistakes in statutory construction and interpretation that will exacerbate the deleterious consequences of the inter-circuit conflict by influencing other federal courts to stray from the Congressional intent evinced in WARN.

A. Anomalous Results Created by the Alternative Readings of the Act.

In an effort to support its holding, the Ninth Circuit perpetuates the fiction that workers with unorthodox or part-time schedules find themselves entitled to disproportionately large damage awards under a calendar day approach simply by virtue of their unusual working arrangements. This argument, first rejected by the Third Circuit in *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39, 43, n.6 (3rd Cir. 1993), but later embraced in *Dillard*, 15 F.3d at 1284, *Saxion*, 86 F.3d at 559, and *Breedlove*, 140 F.3d at 800, postulates that a full-time employee working four 10-hour shifts a week will receive more WARN damages under a calendar day calculation than a fellow employee who works five 8-hour shifts per week. The calendar day approach, the Ninth Circuit erroneously reasoned, requires the first worker to be compensated for sixty days at ten hours a day, for a total of 600 hours of pay. The second worker, on the other hand, receives eight hours of pay per day for the sixty day period, yielding a total of only 480 hours compensation. The court concluded that this was an incurable anomaly that required the rejection of the calendar day approach. Pet. App. at 9a. This simply is not correct.

WARN requires that aggrieved employees receive:

> . . . *back pay for each day of violation* at a *rate of compensation* not less than the higher of . . . the *average regular rate* received by such employee during the last 3

> years of the employee's employment or . . . the final regular rate received by such employee.

29 U.S.C. § 2104(a)(1)(A)(1988). Contrary to the respondent's assertions in *Breedlove*, there is ample authority for the proposition that the term "regular rate" is in fact derived from the Fair Labor Standards Act ("FLSA"),[24] a proposition that, once understood, resolves the purported anomaly relied upon by the Ninth Circuit. Because of the clarity and concise nature of the Secretary of Labor's position on the definition of "regular rate" as derived from the FLSA, and its relationship to the calculation of damages under WARN, and because of the direct applicability of that position to the facts of this case, relevant portions of that position, set forth in full in the DOL Amicus Brief at Pet. App. 49a-51a, are recited here:

> The term "regular rate" derives from the [FLSA] of 1938, 29 U.S.C. 201 *et seq.*, and the compensation scheme embodied in subsections (i) and (ii) of Section 5(a)(1)(A) of [the Act] comes verbatim from Section 7(o)(4) of the FLSA, 29 U.S.C 207(o)(4).[25] * * * Under the FLSA, an employee's "regular rate" is used to determine the minimum amount of overtime pay to which the employee is entitled to for work in excess of 40 hours in a work week. *See* 29 U.S.C. 207(a). That rate includes all amounts paid to the employee, 29 U.S.C. 207(e), and is an "hourly rate" computed "by dividing (the employee's) total remuneration for employment . . . in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. 778.109.
>
> Although the WARN Act specifies the manner in which an employee's hourly rate is to be determined, it does not state the number of hours for which an employee should be credited in computing his damages for a given day.

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24. *Breedlove* Brief in Opposition at 20 - 21.

25. When promulgating the regulations under WARN, "the Secretary expressed his intent to 'rely on the definitions found in the FLSA.' 54 Fed. Reg. 16,049 (1989)." DOL Amicus Brief at Pet. App. 49a, n. 8.

> The court of appeals assumed that if the Act were read to entitle aggrieved employees to back pay for every calendar day of the violation, a worker's award for each day would be based upon the number of hours in that employee's regular shift. The court was concerned that that method of calculation would produce anomalous and unfair results, because an employee who had worked a ten hour shift one day per week would receive a higher WARN Act award than would an employee who had worked five eight-hour shifts per week.
>
> *The court of appeals erred, however, in assuming that, under a "calendar day" approach, a part-time employee's back pay award would be computed by reference to the number of hours in his typical shift. Rather, equitable treatment of full- and part-time workers is ensured by averaging each employee's weekly hours over the typical five-day work week.* Thus, a part-time employee who worked a ten-hour shift one day per week would receive daily damages at his or her hourly "regular" rate for two hours of work per day, while a full-time employee would receive daily damages at his or her hourly "regular" rate for eight hours of work per day. The amount owed to such employees would then be calculated by multiplying the daily damages by the number of calendar days in the violation period (minus any statutory reductions). Under that formulation, a part-time employee is entitled to daily damages proportionally lower than those to which a full-time employee is entitled, and all full time employees (*i.e.*, 40-hour-per-week) are treated equivalently regardless of their work schedules. * * * [26]. The court of appeals limitation of damages to days on which a particular employee would have worked is therefore unnecessary to prevent anomalous and inequitable treatment of employees who have different work schedules.

Id. (emphasis added) (footnotes omitted).[27]

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26. The formulation urged by the DOL is exactly the method used by Respondent Stone Forest to compute petitioners' WARN "pay." Pet. App. at 16a-17a.

27. In attempting to support the anomaly cited by the Eighth Circuit in *Breedlove*, and dismiss the argument made by Petitioners there, which mirrored

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In fact, contrary to the Ninth Circuit's analysis, it is the work day approach and not the calendar day approach that produces significant anomalous results in the reading of the Act. First, were a work day interpretation imposed consistently throughout the Act, an employer's obligations under the Act would be correspondingly expanded.[28] Second, the work day interpretation is inconsistent with the plain meaning of the seldom exercised civil enforcement provision of the Act, 29 U.S.C. § 2104(a)(3), which provides for a $500 a day civil fine payable to a local governmental authority for the employer's failure to notify it. The Conference Report provides that "the maximum penalty payable to a local government is $30,000."[29] H.R. Conf. Rep. No. 576, 100th Cong. 2d Sess. 1053, *reprinted in* 1988 U.S.C.C.A.N. 2086. Divided by $500 per day, the $30,000 results in sixty days of violation. As the Secretary of Labor stated:

> It is unlikely that the term 'each day' was intended to have different meanings and consequences in Sections 2104(a)(1)(A) and 2104(a)(3). See, *e.g., Commissioner v. Keystone Consol. Indus., Inc.*, 113 S.Ct. 2006, 2011 (1993) ("It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (citations and internal quotation marks omitted).

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that made by the DOL cited above, Respondent in *Breedlove* attributed the following language to the Ninth Circuit's decision in *Burns* which appears nowhere in that decision: "Nothing in this definition suggests that the number of hours worked per week should be divided by the number of days in the work week to reach a per-day average." *Breedlove* Brief in Opposition, at 21.

28. For instance, the sixty days advanced notice required by the Act, 29 U.S.C. § 2102(a), would, given an average five day working week, be expanded to eighty-four days, an interpretation that employers, including Respondent, most assuredly would not urge. *See* DOL Amicus Brief at Pet. App. 44a, n. 3.

29. The Conference Report treats the civil fine provision and back pay award similarly, determining the amount owed by subtracting the days of notice actually given from sixty days. H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988).

DOL Amicus Brief at Pet. App. 45a (footnote omitted).[30] The anomaly here is that one sort of penalty, due the local government, is calculated by calendar days while the other, due the employees, is calculated by working days.[31]

Third, the workday calculation render superfluous the Act's "offset" provision. 29 U.S.C. § 2104(a)(2). That provision reduces an employer's liability by "any wages paid by the employer to the employee for the period of the violation," and by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." *Id.* As the Third Circuit found, under the lost earnings concept of the work day approach, courts would automatically deduct any money paid in excess of lost wages from the damages, rendering the offset provision superfluous. *North Star Steel,* 5 F.3d at 42.

B. The Act Does Not Require Employers To Pay Employees To Perform No Work.

Yet another significant and clearly erroneous reading of the Act is the Ninth Circuit's conclusion that the ". . . calendar day

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30. Respondent's contention in *Breedlove* that the civil penalty provision for local governments "is neither applicable or relevant to the calculation of back pay" (*Breedlove* Brief in Opposition at 17) overlooks critical legislative history. As the Secretary of Labor points out, the following passage from a House Conference Report "makes clear that (1) back pay and civil fines are to be awarded for the same number of days, and (2) that number is to be determined by subtracting from 60 the number of days for which notice was given." DOL Amicus Brief at Pet. App. 45a, n. 5.

> [I]f the employer provides 20 days notice, then the maximum violation period for purposes of calculating back pay awards or civil fines would be 40 days. ('Violation period' refers to the period of time after a shutdown or layoff in violation of this Act, and extends for the number of days that notice was required but not given.). H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988).

31. Precedent on the calculation of damages due to local governments is scant, and, given the adoption of the work day approach in the Ninth and other circuits, it is very likely that the calculation of such dat ages will be the subject of future litigation.

construction would put financial pressure on the company to reduce expenses in a way that would hamper the workers' opportunities to search for new jobs." Pet. App. at 9a-10a. The court reasoned that a calendar day interpretation of the Act would put financial pressure on companies to keep their workers reporting to idle factories, instead of looking for new jobs, simply to avoid calendar day liability for violation of WARN's notice requirement. *Id.* The court found this result "irrational" and at odds with Congressional intent, because it would make a shutdown ". . . more painful, by discouraging employers from letting workers use the 60-day notice period to search for new jobs." *Id.*

However, it is the court of appeals' analysis which is at odds with Congressional intent. As explained above, the Act requires notice to be given sixty days *before* the intended shutdown, *not*, as suggested by the lower court, *on* the date of the intended shutdown thereby requiring the employer to keep the plant open for an additional sixty days. Moreover, employers who cannot give advanced notice for reasons beyond their control or for legitimate business reasons, are expressly excused from the Act's notice requirements under three critical provisions of the Act which the Ninth Circuit inexplicably overlooked. These provisions, discussed immediately below, make it clear that the *law-abiding* employer never needs to pay workers to "come in every work day during the 60 day notice period" and do nothing. Pet. App. at 9a.

WARN expressly excuses employers from the advance notice requirement under what have come to be known as the "faltering business," "unforeseen business circumstances," and "natural disaster" exceptions. 29 U.S.C. § 2102(b). In short, sixty days notice *is not required* where: (i) an employer is actively pursuing business or capital which, if obtained, would avoid or postpone the shutdown and the employer reasonably believes that giving notice would preclude the obtainment of the new business or capital; (ii) the mass layoff or plant closing is caused by circumstances not reasonably foreseeable at the time notice would have been required; or (iii) where the plant closing or mass layoff is due to a natural disaster.[32] 29 U.S.C.

32. Under these exceptions the employer is required to give its employees as much notice as is practicable when it learns that the covered shutdown or mass layoff will take place. 29 U.S.C. § 2102(b)(3).

§ 2102(b)(1) & (2). Thus, any time an employer is prohibited from giving the required notice by circumstances within any one of these three broad exceptions, it is exempted from liability under the Act. Otherwise, the express terms of the Act, as emphasized repeatedly within the legislative history, require simply that *while the employer is still operating its business*, at least sixty days prior to its intended closing, shutdown or mass layoff, the workers are entitled to notice. Therefore, contrary to the "idle hands" imaginations of the Ninth Circuit, in no way does the Act *ever* require the law-abiding employer to pay its workers to do nothing.[33]

C. Misapplication of the Cannons of Statutory Construction

Additionally, the Ninth Circuit's selective use of the cannons of statutory construction in construing the term "back pay" to support its work day position is untenable. As the Ninth Circuit noted, it may well be the case that, ". . . 'back pay' for employees has traditionally been understood to mean 'a sum equal to what they normally would have earned' had the violation not occurred," Pet. App. at 10a, and that words that have been assigned a well-defined meaning by the courts are generally presumed to have that meaning in subsequently enacted statutes. What the court selectively ignored is that the meaning of a word in a statute should *first* be determined from the *context* in which it is used. *Deal v. United States,* 508 U.S. 129, 131 (1993). Its failure to follow this cannon of statutory construction sets bad precedent for other courts considering this and other questions of statutory construction.

Like the Eighth Circuit in *Breedlove*, 140 F.3d at 800, the Ninth Circuit inexplicably and summarily severed the term "back pay" from its context in the phrase "back pay *for each day of violation.*" As the district court in *Dillard* reasoned:

> There is no rational explanation for inclusion in the Act of the phrase 'for each day of violation' if Congress

33. The Respondent in *Breedlove* makes a similar "idle hands" argument to support the notion that, despite a work day computation, the Act is still punitive in nature because an employer must pay for work not performed. *Breedlove* Brief in Opposition at 14. For the reasons stated above, that argument is devoid of merit.

> intended to limit an employee's recovery only to wages he would have earned during the period of the violation.

Carpenters Dist. Council v. Dillard Dep't. Stores, 778 F. Supp. 297, 309 (E.D. La. 1991). Congress' inclusion of this phrase must be assumed to have had a purpose.[34] As the DOL aptly concluded:

> [r]ead in the context of the Act as a whole, it is clear that "each day" can only mean "each calendar day," not "each work day." The Act operates according to calendar days, and makes no reference at all to work days. * * * Moreover, the concluding sentence of 29 U.S.C. 2104(a)(1), which follows the specification of the manner in which compensation for "each day of violation" is to be calculated, states that the employer's liability shall be calculated "for the period of the violation," up to a maximum of 60 days, but in no event more than one-half the number of days for which the employee was employed by the employer. Thus, under the Act, the term "period of the violation" identifies the time frame for which the employer is liable. The amount of compensation, however, is calculated for "each day" of that period at the specified "rate of compensation."

DOL Amicus Brief at Pet. App. 44a (citations omitted). Had Congress intended purely compensatory relief to aggrieved workers and

34. The Ninth Circuit's disregard of this phrase is not unlike a problem faced just two years ago in another WARN Act case. In *United Food and Commercial Workers v. Brown*, 517 U.S. 544 (1996), the employer asked this Court to conclude that WARN's provision for suits by unions was attributable only to congressional inadvertence. There, this Court said that

> [t]he argument for Brown Shoe's preferred construction simply rests on one speculative possibility in opposing a straightforward reading of the provision that a union may bring suit on behalf of its members. . . . Speculation loses, for the more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight.

Id. at 550.

calendar day penalties to governmental units, it would have used *different* terminology. For example, it could easily have required "back pay" for each "working day" of the violation. It did not, and it cannot be presumed that the Congress inserted "idle," "meaningless," or "superfluous" verbiage into the statute. 82 C.J.S. *Statutes* § 316 (1953). The plain language of the statute must be adhered to.

CONCLUSION

For the reasons stated above, this Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit, as well as the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit in *Breedlove v. Earthgrains,* should be granted.

Respectfully submitted,

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APPENDIX A — JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 14, 1998

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 96-35715
CT/AG#: CV-95-06103-TMC

ROSELLA E. BURNS; TIMOTHY RAY KEENER; TED-HYUN KIM; EMIL MARTIN; BELLE MCGOVERN; BRENDA L. MIOTKE; KEITH MIOTKE; WILLIAM PARKER; LAVERN RHODES; ORRIN SAVAGE; LARRY VETTER

Plaintiffs-Appellants

v.

STONE FOREST INDUSTRIES INC

Defendant-Appellee

APPEAL FROM the United States District Court for the District of Oregon (Eugene).

THIS CAUSE came on to be heard on the Transcript of the Record of from the United States District Court for the District of Oregon (Eugene) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 07/14/98

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROSELLA E. BURNS; TIMOTHY RAY KEENER; TED-HYUN KIM; EMIL MARTIN; BELLE MCGOVERN; BRENDA L. MIOTKE; KEITH MIOTKE; WILLIAM PARKER; LAVERN RHODES; ORRIN SAVAGE; LARRY VETTER,
Plaintiffs-Appellants,

v.

STONE FOREST INDUSTRIES, INC.,
Defendant-Appellee.

No. 96-35715
D.C. No.
CV-95-06103-TMC
OPINION

Appeal from the United States District Court,
for the District of Oregon
Thomas M. Coffin, Magistrate Judge, Presiding

Argued and Submitted
September 11, 1997—Portland, Oregon

Filed July 14, 1998

Before: William C. Canby, Jr., Thomas G. Nelson, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Andrew J. Kleinfeld

SUMMARY

Labor and Employment/Compensation

The court of appeals affirmed a judgment order of the district court. The court held that under the Worker Adjustment

and Retraining Notification Act (WARN), employees who are deprived of 60 days notice of a plant closure are entitled to receive pay only for work days during that period.

On September 26, 1994, appellee Stone Forest Industries, Inc. notified employees of its plywood mill that the plant would close down two days later. Stone Forest advised the employees that they would be paid until November 26, 61 days after the notice, based on what they had worked before the shutdown.

Appellant Rosella Burns and other employees brought a class action against Stone Forest, alleging that under WARN, they were entitled to be paid for each calendar day during the last 60 days, not just each workday. There were 18 fewer workdays than calendar days in the 60-day period.

The district court ruled that the employees were entitled to pay for only workdays during the 60-day period. The employees appealed.

[1] The statute made the company liable for "back pay for each day of violation" to be "calculated for the period of the violation, up to 60 days." The reading favorable to the company was that "back pay" means what the employees would have been paid had the violation not occurred. The reading favorable to the workers was that "for each day of violation" means pay for every calendar day during the period, not just every workday. The case could not be resolved by reading the words and looking up definitions because a literal reading of the statute allows for either. [2] It made no sense to parse the ambiguous legislative history.

[3] The preferable way to resolve linguistic ambiguity is to evaluate the alternative readings in light of the purpose of the statute. [4] The statute is a wage workers' equivalent to business interruption insurance. A worker is entitled to be warned before his plant shuts down unless a statutory exception

applies. [5] In line with that purpose, it made sense to require the company to pay the worker for 60 workdays. [6] It did not make sense to require the company to pay him for calendar days without regard to workdays because the stream of income would be arbitrarily long for some workers and short for others. The large difference is arbitrary relative to the statutory purpose.

[7] Another reason why the workdays approach makes more sense is that the calendar days construction would put financial pressure on the company to reduce expense in a way that would hamper workers' opportunities to search for new jobs. The company could avoid liability by requiring workers to come in every workday during the 60-day notice period, and tell them to sit and waste time in a plant that produces nothing. Courts should not choose a construction of ambiguous statutory language that would attribute irrationality to Congress.

[8] The workdays approach was a good literal reading. The statute says that the company must pay "back pay" for every day of the violation period. The term "back pay" for employees has traditionally been understood to mean "a sum equal to what they normally would have earned" had the violation not occurred. [9] The district court did not err in dismissing the WARN claim.

COUNSEL

Megan Glor, Swanson, Thomas & Coon, Portland, Oregon, for the plaintiffs-appellants.

Joel H. Spitz, Ross & Hardies, Chicago, Illinois, for the defendant-appellee.

Kary L. Moss and Lamont Satchel, Maurice and Jane Sugar Law Center, Detroit, Michigan, for amici curiae International

Appendix A

Brotherhood of Teamsters, Laborers International Union of North America, United Electrical, Radio and Machine Workers of America, United Food and Commercial Workers Union, United Mineworkers International Union, Union of Needletrades, Industrial and Textile Employees.

OPINION

KLEINFELD, Circuit Judge:

The only significant issue in this case is whether employees deprived of 60 days notice of a plant closing are entitled to get paid for each of the 60 days, or for what would have been work days during the 60 days. The Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq., controls. We join most of the other circuits that have ruled on the issue in construing the statute to mean work days.

FACTS

Because of restrictions on timber supply and rising costs, Stone Forest Industries shut down its plywood mill in Albany, Oregon. The company told the employees on September 26, 1994, that the mill would close two days later, September 28, but that they would be paid until November 26, 61 days after the notice. They could pick up their paychecks each payday at the personnel office. Even though the mill would be closed and they would not be working, they would get paid during the 61 days, measured by what they had worked before the shutdown, with benefits and vacation pay to be cashed out with their final paychecks.

The full time employees brought a class action for additional pay. Their theory was that they should get paid for each calendar day during the last 60 days, not just each work day. The magistrate judge opined that they were entitled only to be

paid for the work days, and because the company had paid them fully for all work days, they were entitled to no damages for the company's failure to give them the required 60 days notice before the mill shut down. The district court accepted the magistrate judge's recommendation, and granted summary judgment to the company. The workers appeal. No party asserts that there are any issues of fact.

ANALYSIS

Congress passed a law in 1988 saying that "[a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice. . . ." 29 U.S.C. § 2102(a).

The statute carefully delineates the liability of employers who violate its terms, and provides that the remedies listed are "exclusive." 29 U.S.C. § 2104(b). The remedy relevant to the case at bar is "back pay for each day of violation" "for the period of the violation":

> **(a) Civil actions against employers**
>
> (1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for —
>
> (A) back pay for each day of violation at a rate of compensation not less than the higher of—
>
> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

> (ii) the final regular rate received by such employee;
>
> . . .
>
> Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

29 U.S.C. § 2104(a)(1). The employer's liability is reduced by wages and other payments the employer makes to the laid off employees for the period of the violation. 29 U.S.C. § 2104(a)(2). Civil penalties of not more than $500 per day may be imposed in some circumstances, on top of the back pay. 29 U.S.C. § 2104(a)(3). This appeal does not raise any question of liability for a penalty.

There were 18 fewer work days than calendar days in the 60 day period at issue. The period included about nine weeks, spanning 17 weekend days and Thanksgiving. The company paid the workers the rate to which they would have been entitled for all work days, but not for calendar days within the 60 day period that would not have been work days. The money at stake is what the workers would have been paid, had their hourly rates applied to those 18 non-work days.

[1] The statute makes the company liable for "back pay for each day of violation" to be "calculated for the period of the violation, up to a maximum of 60 days." The reading favorable to the company is that "back pay" means what the employees would have been paid, had the violation not occurred. The reading favorable to the workers is that "for each day of violation" and "calculated for the period of the violation" means pay for every calendar day during the period, not just every work day. Each side makes a "plain language" argument. We cannot resolve the case simply by reading the words and looking up their definitions, because a

literal reading of the words and syntax of the statute allows for either reading.

[2] One approach to this form of ambiguity is to look to legislative history. "As is often the case, the legislative history is more indeterminate in its meaning than the statute itself." *United States v. Baird,* 85 F.3d 450, 454 (9th Cir. 1996). The Senate Report supports the work days analysis: "wages . . . the employee would have received had the plant remained open." S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987). The House Report is less clear, but seems to favor the calendar days analysis: "for each day of violation, an employer is liable to each aggrieved employee for the amount paid in wages and benefits to such employee prior to the layoff." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988). Neither formulation was passed by both houses and was signed by the president, so neither formulation is the law. *See Puerta v. United States,* 121 F.3d 1338, 1344 (9th Cir. 1997). It makes no sense to parse the ambiguous legislative history as though it were the law.

[3] The preferable way to resolve linguistic ambiguity is to evaluate the alternative readings in light of the purpose of the statute. *See Sacks v. Commissioner,* 69 F.3d 982, 992 (9th Cir. 1995). "We must examine the meaning of the words to see whether one construction makes more sense than the other as a means of attributing a rational purpose to Congress." *Longview Fibre Co. v. Rasmussen,* 980 F.2d 1307, 1311 (9th Cir. 1992). Law is more complex and interesting than algebra, because the words are not mere symbols to be manipulated, but expressions of human purposes to be served.

[4] The statute is a wage workers' equivalent of business interruption insurance. It protects a worker from being told on payday that the plant is closing that afternoon and his stream of income is shut off, though he has to buy groceries for his family that weekend and make a mortgage payment the next week. The name of the act is a somewhat strained attempt to

come up with a good acronym, WARN, suggesting its purpose, "Worker Adjustment and Retraining Notification Act," P.L. 100-379 § 1. A worker is entitled to be warned before his plant shuts down, unless one of the statutory exceptions applies.

[5] In line with that purpose, it makes perfect sense to require the company to pay the worker for 60 work days. That means his stream of income continues to flow for 60 days after he knows the plant will shut down, so he has two months to look for a new job, perhaps in a new town if the plant shutdown decimated employment in his town.

[6] It does not make sense to require the company to pay him for calendar days without regard to work days, because the stream of income would be arbitrarily long for some workers and short for others. Under the calendar days approach, someone who worked 4 10-hour shifts in a week would replace a much longer stream of income than someone who worked 5 8-hour shifts per week. The 4 10s worker would get 10 hours times 60 days, 600 hours of pay. The 5 8s worker would get 8 hours times 60 days, 480 hours of pay. But that is 15 weeks of income for the 4 10s worker, 12 weeks for the 5 8s worker. The large difference is arbitrary relative to the statutory purpose. Under the work days approach, both workers get what they would have earned in the two-month notice period, were there to be no shutdown. That serves the statutory purpose of providing a two-month uninterrupted income stream facilitating a job search.

[7] Another reason why the work days approach makes more sense is that the calendar days construction would put financial pressure on the company to reduce expense in a way that would hamper the workers' opportunities to search for new jobs. The company in this and any case could avoid liability by requiring the workers to come in every work day during the 60-day notice period, and tell them to sit and waste time in a plant that produced nothing. But if the company

closes the plant and tells the workers to come in for their paychecks and otherwise feel free to look for work, retrain, or do as they like during the 60-day period, then under the workers' theory in this case, it has to pay them for weekends and holidays. Indeed, Stone Forest, the defendant in this case, did exactly what the more sensible alternative describes. Congress was trying to make a shutdown less painful for the workers, yet the construction urged by the workers and the amici in this case would make a shutdown more painful, by discouraging employers from letting workers use the 60-day notice period to search for new jobs. We should not choose a construction of ambiguous statutory language that would attribute irrationality to Congress, where the words also lend themselves to a sensible construction.

[8] The work days approach is a good literal reading. The statute says that the violating company must pay "back pay" for every day of the violation period. The term "back pay" for employees has traditionally been understood to mean "a sum equal to what they normally would have earned" had the violation not occurred. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197 (1941). The 4 10s worker normally would have earned compensation for about 9 weeks, 360 hours, in a 60 day period, not 600 hours. The 5 8s worker, likewise 360 hours, not 480. The "back pay" for a day that a worker would not have worked had there been no violation would be zero.

Although this is a case of first impression for us, several other circuits have decided the question raised. The Third Circuit tackled the question first, and adopted the calendar days construction favored by the workers. *United Steelworkers of America v. North Star Steel Co.,* 5 F.3d 39, 43 (3d Cir. 1993). But three other circuits, the Fifth, Sixth and Tenth, have subsequently rejected the Third Circuit's reasoning and result, and adopted the work days approach. *Carpenters Dist. Council of New Orleans v. Dillard Dept. Stores, Inc.,* 15 F.3d 1275, 1283-85 (5th Cir. 1994); *Saxion v. Titan-C-Manufacturing, Inc.,* 86 F.3d 553, 560-61 (6th Cir. 1996); *Frymire v. Ampex*

Corp., 61 F.3d 757, 771-72 (10th Cir. 1995). We agree with the critique the other circuits have made of the Third Circuit construction, and with the Tenth Circuit's observation that the legislative history "remain[s] susceptible to the same multiple interpretations" as the statutory language. *Frymire*, 61 F.3d at 771.

[9] The workers argue that the district court erred in holding that the "good faith" provision of 29 U.S.C. § 2104(a)(4) applied, but we need not reach the issue, because of our conclusion on the work days or calendar days issue. The workers also argue that the district court erred in declining to exercise supplemental jurisdiction over their state law claim under the Oregon Wage Law, ORS § 652.140, but only "because the district court erred in dismissing plaintiff's WARN Act claim." Because we have held that the district court did not err in dismissing the WARN Act claim, this contention need not be considered further.

AFFIRMED.

APPENDIX B — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED MAY 14, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 95-6103-TC

ROSELLA E. BURNS, TIMOTHY RAY KEENER, TED-HYUN KIM, EMIL MARTIN, BELLE MCGOVERN, BRENDA L. MIOTKE, KEITH J. MIOTKE, WILLIAM D. PARKER, LAVERN RHODES, ORRIN SAVAGE, AND LARRY VETTER,

Plaintiff,

v.

STONE FOREST INDUSTRIES,

Defendant.

JUDGMENT

This action is dismissed.

Dated: May 14, 1996

Donald M. Cinnamond, Clerk

s/ Christy Weller
by Christy Weller, Deputy

JUDGMENT **DOCUMENT NO: 52**

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil No. 95-6103-TC

ROSELLA E. BURNS, TIMOTHY RAY KEENER, TED-HYUN KIM, EMIL MARTIN, BELLE MCGOVERN, BRENDA L. MIOTKE, KEITH J. MIOTKE, WILLIAM D. PARKER, LAVERN RHODES, ORRIN SAVAGE, AND LARRY VETTER,

Plaintiff,

v.

STONE FOREST INDUSTRIES,

Defendant.

ORDER

Magistrate Judge Thomas M. Coffin filed Findings and Recommendation on March 21, 1996, in the above entitled case. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's report. *See* 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

Plaintiff has timely filed objections. I have, therefore, given *de novo* review of Magistrate Judge Coffin's rulings.

Appendix B

I find no error. Accordingly, I ADOPT Magistrate Judge Coffin's Findings and Recommendation filed March 21, 1996, in its entirety.

IT IS SO ORDERED, defendant's motion (#35) for summary judgement as to plaintiffs' WARN Act claim is granted and plaintiffs' motion (#33) for partial summary judgement is denied. In addition, plaintiffs' state law claim is dismissed and this action is dismissed.

DATED this 13th day of May, 1996.

s/ [Michael R. Hogan]
UNITED STATES DISTRICT JUDGE

APPENDIX C — FINDINGS AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED MARCH 26, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil No. 95-6103-TC

ROSELLA E. BURNS, TIMOTHY RAY KEENER, TED-HYUN KIM, EMIL MARTIN, BELLE MCGOVERN, BRENDA L. MIOTKE, KEITH J. MIOTKE, WILLIAM D. PARKER, LAVERN RHODES, ORRIN SAVAGE, AND LARRY VETTER,

Plaintiff,

v.

STONE FOREST INDUSTRIES,

Defendant.

FINDINGS AND RECOMMENDATION

COFFIN, Magistrate Judge:

Plaintiffs bring this class action under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109, (WARN) alleging defendants failed to provide the required notice of the shutdown of its Albany, Oregon plywood mill. Plaintiffs also claim that defendant failed to pay them their earned wages at the time of their discharge as required by the Oregon Wage Claim Act, ORS § 652.140. Presently before the court are defendant's motion (#35) for

summary judgment and plaintiffs' motion (133) for partial summary judgment.

FACTUAL BACKGROUND

Plaintiffs are former hourly-rate employees of defendant Stone Forest Industries' Albany, Oregon plywood mill who lost their jobs as a result of the mill's shutdown. Defendant, as a result of restrictions on timber supply and rising costs, decided to permanently shut down its Albany Mill on September 28, 1994. Defendant gave notice to its hourly employees on September 26, 1994.[1]

Following the shutdown, defendant provided each hourly employee with full benefits including health insurance coverage and contributions to the employees' retirement plan for a sixty day period concluding November 26, 1994. In addition, defendant provided each employee with pay, on regular paydays, for each day the employees would have worked in the sixty day period.[2] Each employee's shutdown pay was calculated at the higher of (1) the employee's rate of regular pay at the time of the shutdown, or (2) the employee's average rate of regular pay for the period from August 1, 1994 to

1. Defendant also gave notice to local and state government officials On September 26, 1994 and to the Dislocated Worker Unit of the Oregon Development Department on September 27, 1994.

2. There were forty-two work days in the sixty day period following the shutdown. Approximately forty-five employees agreed to work after the shutdown to complete production and clean and close the mill. After their last day of work, the employees who agreed to work after the shutdown received shutdown pay for the remaining days in the sixty day period. In addition, the post-shutdown employees received an extra day of pay for each day they worked after the shutdown.

September 28, 1994. For each workday in the sixty day period, each employee received overtime shutdown pay for the average number of hours the employee worked per day during the August 1, 1994 through September 28, 1994 period. The overtime pay was calculated at the higher of (1) the employee's rate of overtime pay at the time of the shutdown, or (2) the employee's average rate of overtime pay for the period from August 1, 1994 to September 28, 1994. Furthermore, each hourly employee continued to accrue vacation pay during the sixty days, which was paid in a lump sum at the conclusion of the sixty day period.

STANDARDS

Summary judgment is appropriate where "there is no genuine issue as to any material fact and. . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Rule 56 (c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with

respect to which she has the burden of proof. *Id.* at 32. There is also no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355 (1986); *Taylor v. List*, 880 F.2d 1040 (9th Cir. 1989).

On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). The inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valadingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences may be drawn, summary judgment is inappropriate. *Sankovich v. Insurance Co. of North America*, 638 F.2d 136, 140 (9th Cir. 1981).

DISCUSSION

Plaintiffs' WARN Act Claim

29 U.S.C. § 2102(a) provides that

> An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order —
>
> (1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and
>
> (2) to the State dislocated worker unit (designated or created under title III of the Job Training

Appendix C

Partnership Act [29 U.S.C.A. § 1651 et seq.]) and the chief elected official of the unit of local government within which such closing or layoff is to occur. . . .

29 U.S.C. § 2104 (a) provides that

> (1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for —
>
> > (A) back pay for each day of violation at a rate of compensation not less than the higher of —
> >
> > > (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
> >
> > > (ii) the final regular rate received by such employee; and
> >
> > (B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.
>
> Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in

no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by —

> (A) any wages paid by the employer to the employee for the period of the violation;
>
> (B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and
>
> (C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

. . . .

(4) If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation

> of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

As will be discussed below, the critical inquiry in this case is how back pay damages for violation § 2102 are calculated under § 2104 (a).

A. Defendant Violated the Notice Requirements of the WARN Act

Defendant first contends that it complied with the WARN Act's notice requirements because it provided its employees with full wages and benefits for sixty days following the shutdown. Defendant concedes that it did not provide notice to the hourly employees sixty days prior to the shutdown, but argues that a technical application of the WARN Act's notice provisions should be rejected because in this case the employees had an adequate opportunity to adjust to the pending loss of their jobs and because the employees received just as much compensation as they would have received if defendant had required the employees to work through the sixty days following notice of the shutdown and closed the mill on November 26, 1994. *See Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 935 (5th Cir. 1994) (fully excused leave, with pay and benefits, complies with the purposes of WARN).

This case differs from *Williams* in that *Williams* involved a mass layoff and the notice to the affected employees stated that the layoff was at least sixty days after the notice date. Furthermore, there was no evidence to support the assertion that Phillips immediately terminated the laid off employees. In the instant case, however, defendant shut down its mill

immediately after giving notice and did not place its hourly employees on "excused leave"; it merely chose to continue paying its employees and providing benefits for a sixty day period following shutdown. Although defendant provided its employees with full wages and benefits for sixty days following the mill's shutdown, defendant clearly violated the notice provision of § 2102 by failing to provide its employees with notice of the impending shutdown sixty days prior to closing its mill. Nonetheless, as will be discussed below, even though defendant technically violated the WARN Act, it is entitled to summary judgment on plaintiffs' claim because it is not liable for any further damages under the Act.

B. Defendant's Liability under the WARN Act is Offset by its Payment of its Employees' Wages and Benefits Through the Sixty Day Notice Period

An employer who violates the notice requirement of § 2102 shall be liable for "back pay for each day of violation." As set out above, § 2104 provides for reduction of the employer's liability under the Act for wages and benefits paid during the period of the violation. The parties agree that defendant paid its hourly employees for each workday in the sixty days following the mill's closure. Plaintiffs contend, however, that defendant is required to pay plaintiffs their average daily wage for each calendar-day of the violation up to a maximum of sixty days.

The issue of whether damages are calculated based on a calendar-day approach or workday approach has not been addressed by the Ninth Circuit. Resolving the dispute over the meaning of an employer's liability for violation of the Act begins with the language of the statute itself. *See Landreth*

Timber Co. v. Landreth, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301 (1985). Where the statute's language is plain, the sole function of the court is to enforce it according to its terms, except in the rare cases in which a literal application of the language will produce results demonstrably at odds with the intentions of its drafters. *United States v. Ron Pair Enter.*, 489 U.S. 235, 241-42, 109 S.Ct. 1026, 1030-31 (1989). If, however, the statute is susceptible to more than one reasonable interpretation, then it is necessary to look beyond the language to determine Congress' intent.

Section 2104 is quite detailed in providing the amount of damages an employer shall pay to its affected employees when the employer fails to provide notice of a plant closing. However, I do not agree with plaintiffs' contention that the statute is unambiguous on its face, compelling the conclusion that damages are to be calculated on the basis of calendar-days. The circuit courts that have considered the issue are split.

In *United States Workers of America v. North Star Steel Co., Inc.*, 5 F.3d 39, 42 (3rd Cir. 1993), the Third Circuit found that

> It is undisputed that the days of the violation period are "calendar-days" rather than workdays. *See* 20 C. F. R. § 639.1(a) (1992) ("[N]otice must be given at least 60 calendar-days prior to any planned plant closings or mass layoff. . . ."). In fact no section of WARN expressly refers to "workdays" as opposed to calendar-days). Thus under the plain language of the statute, a violating employer is liable for "back pay" for each of the calendar-days of the violation.

The Court also addressed the argument that the term "back pay" which precedes the phrase for "each day of violation" in

§ 2104 (a) (1) (A) connotes a lost earnings concept such that damages would not be payable for days that the affected employees would not have worked. The court found that such an interpretation would render § 2104 (a) (2) superfluous because a lost earnings concept would automatically exclude the reductions set forth in that section. *Id.* The court also found that if § 2104 (a) (2) were not rendered superfluous then it would produce the absurd result of an employer receiving double credit for any of the payments set forth in that section. *Id.* at 42-43. The court further found that if "back pay" connoted a lost earnings concept, then the employer's liability would be reduced by any earnings the employer receives during the violation period even if those earnings were received from a different employer which is not allowed under § 2104 (a) (2). *Id.* at 43.

In *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275, 1283 (5th Cir. 1994), *cert. denied,* 115 S.Ct 933 (1995), the Fifth Circuit found that § 2104 was ambiguous because "back pay" connotes a remedy that would require the payment of a sum such that the employees would be put in the same position they would have been had the violation never occurred, but the phrase "for each day of violation" appears to require payment of back pay damages for each calendar-day within the violation period. Thus, the court went on to examine the legislative history and determined that Congress intended the "back pay" language to connote the traditional back pay remedy. *Id.* at 1283-85. *See also Frymire v. Ampex Corp.*, 61 F.3d 757, 772 (10 Cir. 1995) (finding ambiguity and that a workdays damage calculation better reflects the purpose of the statute).

I find that the statute's damage provision making an employer liable for "back pay for each day of violation" is

susceptible to more than one reasonable interpretation. On the one hand, the phrase for each day of violation" especially when read in conjunction with the sentence "[s]uch liability shall be calculated for the period of the violation, up to a maximum of 60 days" and 29 C.F.R. 639.1(a) (employers must provide notification 60 calendar-days in advance of plant closing) could reasonably mean that the employer is liable for back pay for each calendar-day of violation. On the other hand, the statute could reasonably mean that an employee can receive "back pay for each day of violation," but if that employee would not have worked on particular days, for example weekends or holidays, then there would be no "back pay" to receive for those days.[3]

---

3. I disagree with the Third Circuit's reasoning that such an interpretation would either render § 2104(a) (2) superfluous or absurd. If "back pay for each day of violation" only provides liability for each working day, then the reduction applied in § 2104(a) (2) would not provide a double credit. It is neither superfluous nor absurd to apply § 2104(a) (2) to a working day approach to calculating damages. For example, if an employer failed to give any notice of a plant closing it would be liable for the maximum of sixty days. *See* 29 U.S.C. § 2104 (a) (1). Within that sixty days there are forty-two working days (sixty calendar-days minus eighteen weekend days) to which the employee is entitled to back pay under § 2104 (a) (1). Assume also that the employer provides a package that pays full wages and benefits for two weeks (or ten working days pay). It is only under § 2104 (a) (2) that the employer's liability would be reduced by the "wages" it voluntarily paid (ten days of pay) and it would still be liable for the thirty-two days of "back pay" for the remaining days the employee would have worked. Using a working day concept does not suggest that the employer would first receive credit for the ten days of pay to be subtracted to compute the "back pay" under § 2104(a) (1) and then again under § 2104(a) (2). Under § 2104(a) (1) if the employee would have worked forty-two days, then there are forty-two working days for which the employer is liable, regardless of the fact that the employer provided ten days of pay during

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This is bolstered by the Supreme Court's statement that "back pay" requires "payment. . . of a sum equal to what [the employee] normally would have earned" had the violation never occurred. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197, 61 S.Ct. 845, 854 (1941).[4] Thus, it is necessary to turn to the legislative history for guidance.

In *Dillard,* the Fifth Circuit found that the legislative history made it clear that Congress intended the "back pay" language in the WARN Act to connote the traditional back pay remedy based on S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987) which states that

> [f]or violations of the notice provisions, damages are to be measured by the wages. . . *the employee would*

(Cont'd)
the sixty day violation period. It should also be noted that the court's contention in *Dillard,* 15 F.3d at 1284 n.14, that § 2104 (a) (2) does not apply in the context of a termination appears to be incorrect. *See* H.R. Conf. Rep. 100-576, 100th Cong., 2nd Sess. (1988), 1988 WL 170253 at *1361-62 (the offset provision also would apply if an employer offers employees a payment in a voluntary unconditional effort to ease the burden of termination).

Also for the same reason expressed in *Dillard,* I find unpersuasive the Third Circuit's reasoning that a lost earnings concept of back pay is inconsistent with the statute's purpose because § 2104(a) (2) does not allow the employer to deduct for wages paid by other employers. See *Dillard,* 15 F.3d at 1284 n. 14.

4. "When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 813, 109 S. Ct. 1500, 1506 (1989).

> *have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period,* less any wages or fringe benefits received from the employer during that period. This is in effect a liquidated damages provision, designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

The report clearly indicates that damages are to be calculated using the number of workdays in the violation period rather than the number of calendar-days because using the calendar-day approach would provide the employee with damages in excess of what he or she would have received had the plant remained opened. However, plaintiffs in this case point to legislative history which indicates that Congress intended to utilize a calendar-day approach to damages. For example, Senator Hatch, in raising concerns about causing incentive for litigation, indicated that damages would be calculated on a calendar-day basis: "Take, for example, a company that has had to lay off 300 workers with only a month's notice instead of two. Assuming those workers had an average wage and benefit package amounting to $20 per hour [eight hours per day], the total back pay award could equal $1,440,000." 134 Cong. Rec. 16,028. Thus, Congress' attempts to clarify the damage provision remain susceptible to both interpretations.

While both approaches have merit, I find that the workday approach better reflects the statutory purpose.[5] *See United States v. Koyomejian,* 946 F.2d 1450, 1453 (9th Cir. 1992) (if the statutory language gives rise to more than one reasonable

5. Plaintiffs note that other sections of the Act, use the phrase "period of violation" and the phrase in those sections refers to calendar-days. *See* §§ 2104 (a)(2)(A), (a)(2)(C), and (a)(3) Therefore, plaintiffs

(Cont'd)

interpretation, courts must adopt the interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested). The purpose of the WARN Act is to provide protection to workers and their families through advance notice of plant closures, so that workers and their families have some transition time to adjust to the prospective loss of employment, to seek and obtain alternative employment, and, if necessary, to seek job retraining. 20 C.F.R. § 639.1. The instant case demonstrates how the calendar-day approach may contravene that purpose:

Defendant Stone Forest Industries, as a result of restrictions on timber supply and rising costs, decided to shut down its Albany mill. Immediately following the shutdown, defendant provided each hourly employee with full benefits for the next sixty calendar-days and paid, on each regular payday, the amount the employees would have earned had the mill remained open for the sixty calendar-days. Thus, during the sixty days following shutdown plaintiffs had the opportunity to seek alternative employment and if necessary the time to enter into skill training or retraining[6] allowing the workers to compete in

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(Cont'd)
argue, it is inconsistent to use a workday approach in § 2014 (a) (1) (A). *See* Plaintiffs' Memo (#33) at 16-18. However, the phrase "period of violation" in those sections, unlike the phrase "for each day of violation" in § 2104 (a) (1) (A) is not modified by the term "back pay." Thus it is perfectly consistent to interpret the "period of violation" in terms of calendar-days while using a workday formula because during the "period of violation" there may be days in which there is no "back pay" because the employee would not have worked on those days.

6. Defendant also notified the Dislocated Worker Unit of the Oregon Development Department.

the job market. However, if an employer knew that failure to provide the sixty days of notice before closing its plant would subject it to liability for pay not only on days the employees would have worked, but also for days the employees would not have worked during the sixty days, the employer may opt to force its employees to report to their place of employment even when there is no work for them to do. In such a situation, the employees receive just as much as they would have under the workday approach, but will have much less time in which to seek new employment and/or job retraining.[7] While Congress clearly indicated that notice is an essential component of the Act, payment of full wages that would be received while at the same time allowing the employee to spend his her efforts in the full-time pursuit of alternative employment or job retraining meets the purpose of the Act.

Plaintiffs point out that another purpose of the Act is to punish the employer who fails to give notice prior to a plant closure and argue that a workday approach fails to meet that purpose. However, as stated in S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987): the workday calculation "is in effect a

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7. I am aware of Senator Metzenbaum's comment that "[a]dvance notice is essential because notice facilitates greater participation and because a functioning plant is perhaps the program's single most important resource," and that having the workers "together in the plant [is important] in order to get across to them what can be done for retraining." 134 Cong. Rec. 15,926. However, The Act does not require the employer to provide the retraining program, but does require that notice be given to the Dislocated Worker Unit. In this case, before the commencement of the sixty days in which the affected employees received full pay and benefits without the corresponding duty to report to work, the Dislocated Worker Unit was given notice. In addition, I fail to see how reporting to a job site in which there is little or no work to perform will "facilitate greater participation" in retraining.

liquidated damages provision, designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings."

In addition, adoption of a calendar-day approach could lead to anomalous results. A well-accepted rule of statutory construction requires the courts to avoid interpretations that would lead to absurd or unreasonable results. *See e.g., Haggar Co. v. Helvering,* 308 U.S. 389, 394, 60 S.Ct. 337, 339 (1940). The Fifth Circuit posed the following hypothetical demonstrating the inequities of a calendar-day approach:

> An employer violates the WARN Act by terminating employees without advance notice. Thus, the violation period contains sixty days. Employee "A" is a full time employee who works a regular eight-hour shift each weekday. However, employee "B" is a part-time employee who works just one ten-hour shift each Saturday. Under the [calendar-day] approach, employee "A" would receive 480 hours pay in lieu of notice (eight hours per day times sixty days), while part-time employee "B" would receive 600 hours pay (ten hours per day times sixty days).

Dillard, 15 F.3d at 1285. The court noted that it would be anomalous for the one-day-per-week part-time employee to receive 120 hours pay over what the full-time employee would receive. The possibilities for such inequities are limitless given that it is common to find employees with work schedules that vary from the traditional eight-hour day, forty-hour workweek. Such anomalous results do not occur under the workday approach because the employee only receives pay for the hours he or she would have worked during the sixty day violation period. *Id.* at 1285-86.

Plaintiffs contend that such an anomalous result can be avoided by construing "regular rate" in § 2104 (a) (1) (A) (i) in the same manner as in the Fair Labor Standards Act regulation in 29 C.F.R. § 778.109. Plaintiffs claim that the "regular rate" computation would mean that the employee who works one ten-hour shift per week would receive daily damages of two hours per day. *See* Plaintiffs Memo (#33) at pp. 20-21. However, a reading of 29 C.F.R. § 778.109 does not demonstrate this to be true.

The regulation states that the "regular rate" is the rate *per hour*. The hourly rate "is determined by dividing [the employee's] total remuneration for employment. . . in any workweek by the total hours actually worked by him in that workweek for which such compensation was paid." Thus, applying the definition from the regulation merely provides the hourly rate the employee receives. For example, if an employee works one ten-hour shift per week and receives $100, then the employees "regular rate" of pay is ten dollars per hour. Assuming a calendar-day approach to damages means that the employee gets damages even for days he would not have worked, then the employee is to be paid for his regular shift of ten hours every day. Thus, under the calendar-day approach and the definition of "regular rate" as stated in the FLSA regulation the employee is to be paid "back pay for each day of violation at a rate of compensation not less than the higher of. . . the average "regular rate" of ten dollars per hour for ten hours every day for the sixty day violation period. Nothing in the Act or the FLSA regulation indicates that the hours are to be averaged over a five-day workweek.

For the foregoing reasons, I find that the damages in lieu of notice under the WARN Act should be calculated according

to the workdays within the violation period. Defendant has paid the employees for the days they would have worked during the sixty day violation period. Accordingly, defendant's motion for summary judgment as to plaintiffs' first claim should be granted, plaintiffs' motion for partial summary judgment on the claim should be denied and the claim should be dismissed.[8]

Plaintiffs' Oregon Wage Claim Act

Plaintiffs' second amended complaint also alleges that defendant failed to pay them their earned wages at the time of their discharge as required by ORS § 652.140. Jurisdiction over this claim is based on supplemental jurisdiction by virtue of 28 U.S.C. § 1367 because the claim arises out of the same case or controversy as their federal WARN Act claim. The WARN Act claim in this action should be dismissed. As such, the court should decline to exercise supplemental jurisdiction over plaintiffs' state law claim and it should be dismissed. 28 U.S.C. § 1367 (c) (3); *United Mine Workers v. Gibbs,* 383 U.S. 715,

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8. Moreover, defendant has proven to the satisfaction of this court that its failure to give notice as prescribed by the Act was in good faith because the employer had reasonable grounds for believing that the payment of full benefits and wages for sixty days following the shutdown was not a violation of the Act. *C.F. Williams v. Phillips Petroleum Co.,* 23 F.3d 930, 935 (5th Cir. 1994) (fully excused leave, with pay and benefits, complies with the WARN Act. In addition, defendant has complied in good faith with the objective of the Act. *See Assoc. of Western Pulp and Paper Workers v. ITT Rayonier,* 1994 U.S. Dist. Lexis 13094, *26 (W.D.Wash. 1994). Therefore, even if damages were to be calculated on a calendar-day basis, defendant's good faith believe that it had not violated the Act should lead the court, in its discretion, to reduce defendant's liability to the amount already paid to its employees. *See* 29 U.S.C. § 2104(a) (4).

726 (1966); *Schneider v. TRW Inc.*, 938 F.2d 986, 993-994 (9th Cir. 1991).

CONCLUSION

For all the foregoing reasons, defendant's motion (#35) for summary judgment as to plaintiffs' WARN Act claim should be granted and plaintiffs' motion (#33) for partial summary judgment should be denied. In addition, plaintiffs' state law claim should be dismissed and this action should be dismissed.

DATED this 21st day of March, 1996.

s/ Thomas M. Coffin
THOMAS M. COFFIN
United States Magistrate Judge

APPENDIX D — BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN *CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY, et al. v. DILLARD DEPARTMENT STORES, INC., et al.*
FILED JANUARY 4, 1995

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1857

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY, ET AL., PETITIONERS

v.

DILLARD DEPARTMENT STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Appendix D

QUESTION PRESENTED

Section 5(a)(1)(A) of the Worker Adjustment and Retraining Notification Act provides that an employer who orders a plant closing or mass layoff in violation of the Act's 60-day notification requirement, 29 U.S.C. 2102, "shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for * * * back pay for each day of violation." 29 U.S.C. 2104(a)(1)(A). The question presented is whether this provision entitles aggrieved employees to damages for each calendar day of the violation, or only for each work day on which the employees would have earned wages if no violation of the Act had occurred.

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Appendix D

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1857

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY, ET AL., PETITIONERS

v.

DILLARD DEPARTMENT STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. 2101 *et seq.*, prohibits covered employers, with exceptions not relevant here, from ordering "a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice" of such action to each representative of affected employees, or, in the absence of such a representative, to each employee. 29 U.S.C. 2102(a)(1). The employer is also required to provide

notice to designated state and local officials. 29 U.S.C. 2102(a)(2). Section 2(a) of the Act identifies those plant closings or mass layoffs for which an employer must give notice according to the number of employees affected, 29 U.S.C. 2101(a)(2) and (3), and defines such employees as those who "may reasonably be expected to experience" an "employment loss," including termination, a layoff longer than six months, or a greater than 50 percent reduction in work hours for each of six months, 29 U.S.C. 2101(a)(5) and (6).

Section 5(a)(1)(A) of the Act provides that an employer who violates the statutory notice requirement "shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for * * * back pay for each day of violation." 29 U.S.C. 2104(a)(1)(A). That provision also specifies the "rate of compensation" by which back pay is to be measured as no less than the higher of the employee's "average regular rate * * * during the last 3 years of * * * employment," 29 U.S.C. 2104(a)(1)(A)(i), or the employee's "final regular rate," 29 U.S.C. 2104(a)(1)(A)(ii). Statutory liability extends for a maximum of 60 days, but no more than one-half the number of days for which the aggrieved employee was employed. 29 U.S.C. 2104(a)(1). Section 5(a)(2) provides that a noncomplying employer's liability to an aggrieved employee may be reduced by "wages paid by the employer to the employee for the period of the violation," and by "any voluntary and unconditional payment" from the employer to the employee that does not result from "any legal obligation." 29 U.S.C. 2104(a)(2)(A) and (B).[1] The WARN Act does not provide,

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[1] In addition, Section 5(a)(1)(B) makes the employer liable to each aggrieved employee for "benefits under an employee benefit plan" that the employee would have received "if the employment

however, for a reduction in damages for wages earned during the violation period from another employer.[2]

2. On May 9, 1989, respondent D.H. Holmes Co., Ltd., which was in poor financial condition, became a wholly owned subsidiary of respondent Dillard Department Stores, Inc., by means of a merger. Pet. 4; Pet. App. A2-A4, A42. That merger resulted in the layoff of approximately 800 Holmes employees between May and August 1989. Pet. 5; Pet. App. A43-A44. Approximately 700 of those employees received less than 60 days' notice of their impending layoff. Pet. 5. Recognizing that it had failed to give sufficient notice under the WARN Act, Dillard purported to comply voluntarily with the Act's damages provision by identifying those employees it believed to be covered by the Act, and paying them for the days they would have worked had it given sufficient notice, minus any outstanding severance or vacation pay. *Ibid.*; Pet. App. A4-A5, A44.

3. Petitioners, a class of former employees who were terminated as a result of the merger and who did not receive the requisite notice, filed suit in federal district court against respondents, several of respondents' individual officers and directors, and their fiduciary liability insurer. Pet. App. A5-A6, A41, A70. On petitioners' motion for partial summary judgment, the magistrate judge determined that respondents' failure to

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loss had not occurred." 29 U.S.C. 2104(a)(1)(B). Correspondingly, Section 5(a)(2)(C) permits a reduction in the amount owed for any payment made by the employer to a third party or trustee "on behalf of and attributable to the employee" for the violation period. 29 U.S.C. 2104(a)(2)(C).

[2] Section 5(a)(3) of the Act also provides for "a civil penalty of not more than $500 for each day of * * * violation" against any employer who fails to give the requisite notice to a unit of local government. 29 U.S.C. 2104(a)(3).

provide the requisite notice violated the Act, as neither of the two statutory exemptions to the Act's notice requirement, see 29 U.S.C. 2103, was applicable. Pet. App. A59. The court concluded that Section 5(a)(1) provides "a penalty for fail[ure] to give adequate notice," *id.* at A61, and that Congress had expressed a "clear" intent under that provision to provide damages for every calendar day within the violation period, *id.* at A63. After a separate trial, see *id.* at A44, the court awarded petitioners $1,262,050.10 in damages, together with pre-judgment interest and attorneys' fees. Pet. 6; Pet. App. A89, A90.

4. The court of appeals reversed in relevant part, holding that Section 5(a)(1) entitles aggrieved employees to damages only for lost work days within the statutory violation period. It acknowledged that the Act is "susceptible to more than one reasonable interpretation," and that its decision conflicts with the Third Circuit's contrary holding in *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (1993), cert. denied, 114 S. Ct. 1060 (1994), that Section 5(a)(1) requires payment for every calendar day within the violation period. Pet. App. A16. The court of appeals, however, placed substantial reliance on decisional law holding that "the term 'back pay' commonly means *pay* * * * that an employee would have earned * * * if the event that affected such job related compensation had not occurred." *Id.* at A16-A17 (citing *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941)). The court observed that "[i]f aggrieved employees are paid only for days they ordinarily would have worked during the sixty-day notice period, then those employees are placed in the position they would have occupied had the violation never occurred." *Id.* at A17.

In the Fifth Circuit's view, the legislative history also showed that back pay under the Act "connote[s] the traditional back pay remedy as discussed in *Phelps Dodge*." Pet. App. A19. The court relied for this conclusion on the Senate Report accompanying a predecessor version of the Act, which stated that "damages are to be measured by the wages * * * the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period." *Id.* at A20 (quoting S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987)).

DISCUSSION

The decision of the court of appeals is erroneous and conflicts directly with the Third Circuit's resolution of the same question. Uniform application of the WARN Act is important if the Act is to fulfill its prophylactic purpose. The petition for a writ of certiorari should therefore be granted.

1. The court of appeals in this case primarily relied on its perception that "the term 'back pay' commonly means *pay*, *i.e.*, wages, benefits, etc., that an employee would have earned, or to which she would have otherwise been entitled, if the event that affected such job related compensation had not occurred." Pet. App. A16. We acknowledge that the term "back pay," as used in other statutes, typically connotes a remedy based on the wages that an employee would have earned if no violation of law had occurred. See, *e.g.*, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-198 (1941) (National Labor Relations Act); *United States* v. *Burke*, 112 S. Ct. 1867, 1873-1874 (1992) (Title VII). In our view, however, three features of the statutory scheme at issue here indicate that a WARN Act damage award was intended to serve significant noncompensatory purposes, and that the

award should be calculated for each calendar day of the violation.

a. The Act provides that an aggrieved employee is entitled to back pay for "each day of violation." 29 U.S.C. 2104(a)(1)(A). Read in the context of the Act as a whole, it is clear that "each day" can only mean "each calendar day," not "each work day." The Act operates according to calendar days, and makes no reference at all to work days. Thus, the employer is forbidden to "order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order," 29 U.S.C. 2102(a), and it is undisputed that this provision entitles employees to notice 60 calendar days prior to the plant closing or layoff, without regard to the employees' (potentially varying) work schedules within that 60-day period.[3] Moreover, the concluding sentence of 29 U.S.C. 2104(a)(1), which follows the specification of the manner in which compensation for "each day of violation" is to be calculated, states that the employer's liability shall be calculated "for the period of the violation," up to a maximum of 60 days, but in no event more than one-half the number of days for which the employee was employed by the employer.[4] Thus, under the Act, the term "period of the violation" identifies the time frame for which the employer is liable. The amount of compensation, however, is calculated for "each day" of that period at the specified "rate of compensation."

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[3] Indeed, a requirement that notice be given 60 work days prior to a plant closing or mass layoff would substantially expand the employer's obligations under the Act.

[4] Compare also 29 U.S.C. 2104(a)(2)(A) and (C) and the final sentence of 29 U.S.C. 2104(a)(2) (providing for the offset of wages and for health and pension contributions attributable to "the period of the violation").

The Act also provides for a civil penalty, payable to an affected "unit of local government," in an amount not to exceed "$500 for each day of such violation." 29 U.S.C. 2104(a)(3). Respondents acknowledge (Br. in Opp. 10) that, "[v]ery clearly, Congress meant for an employer to be subject to a $500 a day penalty, regardless of whether employees worked on those days or not." It is unlikely that the term "each day" was intended to have different meanings and consequences in Sections 2104(a)(1)(A) and 2104(a)(3).[5] See, *e.g.*, *Commissioner* v. *Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006, 2011 (1993) ("It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the

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[5] The Conference Report states that "if the employer provides 20 days notice, then the maximum violation period for purposes of calculating back pay awards or civil fines would be 40 days. ('Violation period' refers to the period of time after a shutdown or layoff in violation of this Act, and extends for the number of days that notice was required but not given.)." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988). That passage makes clear that (1) back pay and civil fines are to be awarded for the same number of days, and (2) that number is to be determined by subtracting from 60 the number of days for which notice was given.

The Conference Report initially accompanied H.R. 3, 100th Cong., 1st Sess. (1987), which included plant-closing provisions. H.R. 3 passed the Congress in 1988 but was vetoed by President Reagan. The plant-closing provisions were subsequently passed separately in the WARN Act, Pub. L. No. 100-379, 102 Stat. 890 (1988). Because the WARN Act is "identical to the plant closing provision" included in H.R. 3, see 134 Cong. Rec. 14,983 (1988) (Sen. Metzenbaum), the legislative history of H.R. 3's plant-closing provisions should be treated as the legislative history of the WARN Act. See also Omnibus Trade and Competitiveness Act of 1988 (OTCA), Pub. L. No. 100-418, § 2, 102 Stat. 1119 (providing that the legislative history of H.R. 3, including the Conference Report, should be treated as the legislative history of the OTCA).

same meaning.") (citations and internal quotation marks omitted). The court of appeals therefore was mistaken in concluding that application of the Act's back pay provision "requires a calculation using the number of work days in the violation period rather than the number of calendar days." Pet. App. A20.

b. The Act provides that the amount of back pay for which a noncomplying employer is liable shall be reduced by "any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. 2104(a)(2)(A). The Conference Report states explicitly what is implicit in that statutory text: "[T]he only payments that may offset the back pay remedy are those made by the violating employer. Wages received from another employer, or unemployment compensation payments received from the State, may not be used to offset the remedy." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1053 (1988).

In order to ensure that a backpay award places an aggrieved employee in the same position he would have occupied but for the employer's unlawful action, computation of the award ordinarily entails an offset for wages earned from another employer. See, *e.g.*, *Phelps Dodge*, 313 U.S. at 197-198;[6] 5 U.S.C. 5596(b)(1)(A)(i) (federal employee aggrieved by unjustified personnel action is entitled to receive "an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have

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[6] Indeed, in *Phelps Dodge* the Court held that the National Labor Relations Board had erred in deducting only those sums actually earned from other employers, and in failing to deduct additional sums that the employee might have earned through reasonable diligence. 313 U.S. at 197-198. The Court explained that, "[s]ince only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Id.* at 198.

earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period"). The court of appeals recognized that the WARN Act's back pay provision diverges in this significant respect from the method by which back pay is ordinarily computed, see Pet. App. A18-A19 n.14, but in our view the court failed to draw the appropriate inference from that divergence. The absence of an offset for wages earned from another employer demonstrates that a WARN Act damage award is intended to serve substantial noncompensatory purposes—that Congress's intent to deter and punish violations of the Act (and to ensure that employees have the security of continuing their existing employment for each day of the 60-day notice period) has been given precedence over any desire to ensure that aggrieved employees receive only the same earnings that they would have received had no violation occurred.

c. The legislative history also shows that Congress's purpose went beyond the compensation of affected workers for earnings lost as a result of premature plant closings. An amendment introduced by Senator Quayle would have permitted employers to comply with the Act by giving "severance pay in lieu of notice." 134 Cong. Rec. 15,926 (1988).[7] In opposing the amendment, Senator Metzenbaum—the Act's principal sponsor—empha-

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[7] Even the Quayle amendment would have provided that the severance pay would be in "an amount equal to the employee's compensation as computed under section [5(a)(1)] multiplied by the number of days that the requisite notice was not given," 134 Cong. Rec. 15,926 (1988)—a formulation that would have made back pay under the Act awardable for each calendar day of the violation, whether or not an aggrieved employee would have worked and earned wages.

sized that "the bill is about giving notice. It is not a mandatory severance bill." *Id.* at 15,928. Senator Metzenbaum noted that, "[a]s stated by the National Academy of Sciences, * * * it is the notice that is essential to successful worker adjustment programs. It is the notice that gives the employee the chance to make other arrangements." *Ibid.* Senator Metzenbaum made clear, moreover, that payment of the wages that an employee would have earned absent the violation would not be an adequate substitute. Quoting from the report of a task force headed by Secretary of Labor Brock, the Senator explained that "[a]dvance notice is essential because notice facilitates greater participation and because a functioning plant is perhaps the [job retraining] program's single most important resource." *Ibid.* Congress's rejection of the Quayle amendment signaled its agreement that the WARN Act was intended, first and foremost, to induce employers to provide the notice that would enable workers to obtain job counseling and retraining at a time when the plant was still operational. An award of damages for each calendar day of the violation better effectuates that prophylactic purpose than does the approach adopted by the Fifth Circuit in the instant case.

2. The court of appeals also expressed the view that its reading of the Act was supported by (a) the anomalous results that it believed would be produced by a contrary interpretation, and (b) the Senate Report accompanying a predecessor version of the Act. The court of appeals' reliance on those considerations was misplaced.

a. Under the WARN Act, back pay is to be assessed at a rate not less than the higher of "the average regular rate received by [the] employee during the last 3 years of the employee's employment" or "the final regular rate received by [the] employee." 29 U.S.C. 2104(a)(1)(A)(i)

and (ii). The term "regular rate" derives from the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, and the compensation scheme embodied in subsections (i) and (ii) of Section 5(a)(1)(A) of the WARN Act comes verbatim from Section 7(*o*)(4) of the FLSA, 29 U.S.C. 207(*o*)(4). See Pet. 19.[8] Under the FLSA, an employee's "regular rate" is used to determine the minimum amount of overtime pay to which the employee is entitled for work in excess of 40 hours in a work week. See 29 U.S.C. 207(a). That rate includes all amounts paid to the employee, 29 U.S.C. 207(e), and is an "hourly rate" computed "by dividing [the employee's] total remuneration for employment * * * in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid," 29 C.F.R. 778.109.

Although the WARN Act specifies the manner in which an employee's hourly rate is to be determined, it does not state the number of hours for which an

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[8] Although the WARN Act does not authorize the Secretary of Labor to institute enforcement actions, it directs the Secretary to "prescribe such regulations as may be necessary to carry out" the Act, including, "at a minimum, * * * interpretative regulations" concerning satisfactory service of notice. 29 U.S.C. 2107(a). Pursuant to that authority, the Secretary has promulgated regulations at 20 C.F.R. Pt. 639. When promulgating those regulations, the Secretary expressed his intent to "rely on the definitions found in the FLSA." 54 Fed. Reg. 16,049 (1989). Those regulations do not address the calculation of damages under the WARN Act. Nevertheless, the position of the Secretary set forth in this brief regarding the proper interpretation of the phrase "back pay for each day of violation" is entitled to substantial deference. Cf. *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988) (agency's interpretation of its own regulation is entitled to deference even when that interpretation had not been asserted prior to the lawsuit in question).

employee should be credited in computing his damages for a given day. The court of appeals assumed that if the Act were read to entitle aggrieved employees to back pay for every calendar day of the violation, a worker's award for each day would be based upon the number of hours in that employee's regular shift. See Pet. App. A20-A22. The court was concerned that that method of calculation would produce anomalous and unfair results, because an employee who had worked a ten-hour shift one day per week would receive a higher WARN Act award than would an employee who had worked five eight-hour shifts per week. *Ibid.*[9]

The court of appeals erred, however, in assuming that, under a "calendar day" approach, a part-time employee's back pay award would be computed by reference to the number of hours in his typical shift. Rather, equitable treatment of full- and part-time workers is ensured by averaging each employee's weekly hours over the typical five-day work week. Thus, a part-time employee who worked a ten-hour shift one day per week would receive daily damages at his or her hourly "regular" rate for two hours of work per day, while a full-time employee would receive daily damages at his or her hourly "regular" rate for eight hours of work per day. The amount owed to such employees would then be calculated by multiplying the daily damages by the number of calendar days in the violation period (minus any statutory reductions). Under that formulation, a part-time employee is entitled to daily damages proportionally lower than those to

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[9] The Third Circuit in *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (1993), cert. denied, 114 S. Ct. 1060 (1994), referred to the same hypothetical scenario but declined to determine how those employees' WARN Act awards would be computed. See 5 F.3d at 43 & nn.6-7.

which a full-time employee is entitled, and all full-time (*i.e.*, 40-hour-per-week) employees are treated equivalently regardless of their work schedules. Compare Pet. App. A21-A22 & n.16. Indeed, it appears that this method of computing damage awards was employed in the instant case. See Pet. 20. The court of appeals' limitation of damages to days on which a particular employee would have worked is therefore unnecessary to prevent anomalous and inequitable treatment of employees who have different work schedules.

b. The court of appeals also placed substantial reliance (see Pet. App. A19-A20) on the Senate Report accompanying a predecessor version of the Act.[10] That report stated:

> For violations of the notice provisions, damages are to be measured by the wages and fringe benefits (including reimbursement for medical expenses) the employee would have received had the plant remained open or the layoff been deferred until the conclusion[] of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provision[], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987).

Although the first sentence of this passage, standing alone, lends support to the conclusion of the court of appeals, the court failed to recognize that other, more

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[10] That version included the "back pay for each day of violation" and "regular rate" formulations, but its treatment of fringe benefits differed somewhat from the statute as later enacted. See S. Rep. No. 62, 100th Cong., 1st Sess. 68 (1987).

contemporaneous, aspects of the legislative history point in the opposite direction. The Conference Report, for example, "clarif[ied] that for each day of violation, an employer is liable to each aggrieved employee for the amount paid in wages and benefits to such employee prior to the layoff, as set forth in section [5(a)(1)]." H.R. Conf. Rep. No. 576, *supra*, at 1052.[11] As one of the Act's co-sponsors stated, "[r]emedies for violation are limited to money damages—the equivalent of a day's wages and fringe benefits for each day of violation for each affected employee." 134 Cong. Rec. 15,516 (1988) (Sen. Kennedy); see also *id.* at 17,867 (Rep. McCrery) (employer's liability for "a day's wages for every day of notification not given" not relieved by fulfillment of contractual obligations); *id.* at 16,028 (Sen. Hatch).[12] As discussed above (see pages 9-10, *supra*), moreover, the Act's principal sponsor emphasized that severance payments would not be an acceptable substitute for the notice

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[11] The Conference Report also uses identical language in describing the employer's liability for back pay and for the civil penalty owed to the local government (which concededly is owed for each calendar day of the violation, see page 7, *supra*). Thus, the Conference Report stated that the Senate bill (which the conferees adopted in relevant part) "provides that an employer which violates the notice provisions of [29 U.S.C. 2102] is liable for back pay and a civil fine for 'each day of violation.'" H.R. Conf. Rep. No. 576, *supra*, at 1052.

[12] In discussing the back pay awards possible under the Act, Senator Hatch stated: "Take, for example, a company that has had to lay off 300 workers with only a month's notice instead of two. Assuming those workers had an average wage and benefit package amounting to $20 per hour, the total back pay award could equal $1,440,000." 134 Cong. Rec. 16,028 (1988). Senator Hatch's calculations assume that back pay under the Act would be awarded for eight hours for each calendar day of the violation (300 workers X 30 days/worker X 8 hours/day X $20/hour equals $1,440,000).

required by the Act, and the rejection of the Quayle amendment suggests that the Senate agreed with that view. The court of appeals therefore erred in concluding that the legislative history, taken as a whole, reflects a congressional determination that "back pay for each day of violation" should be limited to days on which an aggrieved employee would have worked if the violation had not occurred.

3. The question presented in this case warrants review by this Court. As the Fifth Circuit acknowledged, see Pet. App. A16, A20-A21, its decision conflicts directly with that of the Third Circuit in *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (1993), cert. denied, 114 S. Ct. 1060 (1994), which held that, "under the plain language of the statute, a violating employer is liable for 'back pay' for each of the calendar days of the violation." *Id.* at 42. The district courts also disagree as to whether injured employees are entitled under the WARN Act to damages for each calendar day of the violation, or only for lost work days. Compare *Frymire* v. *Ampex Corp.*, 858 F. Supp. 1081, 1084 (D. Colo. 1994) (damages awardable for each calendar day); *Joshlin* v. *Gannett River States Publishing Corp.*, 840 F. Supp. 660, 663 (E.D. Ark. 1993) (same); *Wholesale & Retail Food Distribution Local 63* v. *Santa Fe Terminal Servs., Inc.*, 826 F. Supp. 326, 331 (C.D. Cal. 1993) (same, in dictum) and *United Electrical Workers* v. *Maxim, Inc.*, 5 IER Cas. (BNA) 629, 631-632 (D. Mass. May 15, 1990) (same) with *Washington* v. *Aircap Indus., Inc.*, 860 F. Supp. 307, 311-313 (D.S.C. 1994) (damages not awardable for non-work days) and *Jones* v. *Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1292, 1296 (same), amended in part, 753 F. Supp. 218 (E.D. Tenn. 1990).

However this conflict is resolved, the WARN Act should be uniformly interpreted and applied. The significant number of cases addressing this issue since the WARN Act's enactment attests to its importance, and the wide disagreement among the district courts suggests that the question will ultimately require resolution by this Court. Moreover, coupled with the Act's liberal venue provision, which permits a suit in "any district in which the violation is alleged to have occurred, or in which the employer transacts business," 29 U.S.C. 2104(a)(5), the current conflict is an invitation to widespread forum shopping.[13]

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[13] For instance, an employee who is terminated as the result of a plant shut-down in Louisiana, without the notice required by the WARN Act, could bring suit in the more favorable Third Circuit if the employer happens to "transact[] business" in Pennsylvania, while one whose employer's only business is within Louisiana could not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the

Supreme Court of the United States

October Term, 1998

ROSELLA E. BURNS, *et al.*,

Petitioners,

vs.

STONE FOREST INDUSTRIES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Ninth Circuit erred in determining that the calculation of back pay under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1988), should be based on working days rather than calendar days within the statutory sixty-day notification period.

STATEMENT PURSUANT TO RULE 29.6

Respondent Stone Forest Industries is a division of Stone Container Corporation. Stone Container Corporation has issued shares to the public.

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29 C.F.R. § 778.109 12

134 Cong. Rec. 15,923 (June 24, 1988) 7

OPINIONS BELOW

The Magistrate Judge's Findings and Recommendations granting Respondent Stone Forest Industries' Motion for Summary Judgment is reprinted in the appendix to the Petition for Writ of Certiorari at 15a. The Order of the District Court adopting the Magistrate Judge's Findings and Recommendations is reprinted in the appendix to the Petition for Writ of Certiorari at 13a. The Judgment of the District Court is reprinted in the appendix to the Petition for Writ of Certiorari at 12a. The opinion of the United States District Court of Appeals for the Ninth Circuit affirming the District Court's judgment is reported at 147 F.3d 1182 (9th Cir. 1998), and is reprinted in the appendix to the Petition for Writ of Certiorari at 2a.

STATEMENT OF THE CASE

Petitioners Rosella E. Burns, Timothy Ray Keener, Ted-Hyun Kim, Emil Martin, Belle McGovern, Brenda L. Miotke, Keith Miotke, William Parker, Lavern Rhodes, Orrin Savage and Larry Vetter, on behalf of themselves and others similarly situated, commenced this action in the United States District Court for the District of Oregon against Respondent Stone Forest Industries ("Stone Forest") on March 25, 1995, pursuant to the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. §§ 2101-2109 (1988). Specifically, Petitioners contended that they were entitled to damages equal to back pay and benefits for each calendar day of Respondent's violation of the WARN Act's sixty-day advance notice requirement.

On January 16, 1996, Stone Forest filed a motion for summary judgment on the grounds that, inasmuch as Stone Forest had paid its former employees back pay for every

working day within the notification period, Petitioners were not entitled to any further recovery under the terms of the WARN Act.[1]

On March 21, 1996, Magistrate Judge Coffin (the District Court Magistrate Judge whose findings and recommendations were adopted in their entirety by District Court Judge Michael Hogan) granted Stone Forest's motion for summary judgment, holding that damages under the WARN Act should be calculated by working days within the notice period, rather than calendar days.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's ruling. The Ninth Circuit agreed with the majority of the federal appellate courts which have previously ruled on the issue in concluding that the measure of damages under the statute should be based on the number of days an employee would have worked during the statutory notice period. *Saxion v. Titan-C Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996); *Carpenters District Council of New Orleans v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). After reviewing the ambiguous statutory language and legislative history, the Ninth Circuit looked to the approach which most serves the WARN Act's statutory purpose of "providing a two-month uninterrupted income stream facilitating a job search." The Court concluded that the work days approach is a more rational approach than the calendar days approach.

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[1] Petitioners also cross-moved for partial summary judgment on the same issue.

REASONS FOR DENYING THE WRIT

There is nothing about this case which merits review by this Court. Five of the last six federal appellate courts that have ruled on the issue presented here have rejected Petitioners' arguments, and the work day approach is consistent with the purpose, provisions and legislative intent of the WARN Act.

I.

THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT

A. Five of the Last Six Appellate Courts to Address this Issue have Agreed that the Work Day Approach is the Correct Measure of Damages Under the WARN Act.

Petitioners contend that there exists among the federal courts of appeals an inter-circuit conflict regarding the proper measure of damages under the WARN Act and that the conflict "undermines WARN's national policy as articulated by Congress, the statutory scheme of the Secretary of Labor, and fosters inequitable treatment of plaintiffs, misguided interpretations of the act, and uncertainty for litigants." (Petition for Writ of Certiorari ("Petition") at 9). However, of the six federal appellate courts which have considered the appropriate measure of damages under the WARN Act, the last *five,* including the court below, have held that working days rather than calendar days is the correct way to calculate the back pay due workers under the statute. *Burns v. Stone Forest Industries, Inc.*, 147 F.3d 1182 (9th Cir. 1998); *Breedlove, et al. v. Earthgrains Baking Companies, Inc.*, 140 F.3d 797 (8th Cir. 1998), *cert. denied*, 1998 WL 407117 (Oct.

5, 1998); *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996); *Carpenters District Council of New Orleans v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). Only one appellate court -- the Third Circuit in *United Steelworkers of America v. North Star Steel Company*, 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994), *reh'g denied*, 511 U.S. 1048 (1994), the first appellate court to consider the issue -- has adopted the calendar days approach, and it did so without reference to the legislative history of the WARN Act. Its reasoning, and that of the Petitioners in this case, has been specifically rejected by the federal appellate courts which have subsequently ruled on the issue. Therefore, contrary to Petitioners' contentions, there is little conflict among the federal appellate courts on the issue.

Moreover, this Court denied certiorari in *Breedlove*, *Dillard* and *North Star Steel* and dismissed certiorari in *Frymire*. If certiorari was inappropriate in those cases, when the split in the circuits was more pronounced because fewer courts had ruled on the issue, it is even more inappropriate now, when the conflict among the circuits has been reduced further by the consistent holdings of the federal appellate courts. Since the Third Circuit's decision in the *North Star Steel*, the federal courts of appeals have been unanimous in rejecting the calendar days approach.

Similarly, Petitioners' contention that the lower courts are divided on the issue is meritless. First, the minimal differences among the lower courts on the issue has been largely resolved by the consistency of the federal appellate courts' opinion since *North Star Steel*. Indeed, the lower courts outside the Third Circuit have with near unanimity, applied the working days approach to the calculation of

damages under the WARN Act. *See Local 1239 v. Allsteel, Inc.*, 9 F.Supp. 2d 901 (N.D. Ill. 1998); *Association of Western Pulp and Paper Workers v. Grays Harbor Paper Company*, 1994 U.S. Dist. LEXIS 13094 (W.D. Wash. March 14, 1994); *Breedlove v. Earthgrains Baking Companies, Inc.*, 963 F.Supp. 802 (E.D. Ark. 1997); *Washington v. Air Cap Industries, Inc.*, 860 F.Supp. 307 (D.S.C. 1994); *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F.Supp. 1292 (E.D. Tenn. 1990), *amended in part*, 753 F.Supp. 218 (E.D. Tenn. 1990); *In Re Hanlin Group, Inc.*, 176 B.R. 329 (Bankr. D.N.J. 1995); *In Re Riker, Inc.*, 151 B.R. 823 (Bankr. N.D. Ohio 1993). Petitioners cite only two cases which apply the calendar days approach, both of which were from the District of Massachusetts. *Sinischalchi v. Shop-Rite Supermarkets, Inc.*, 903 F.Supp. 182 (D. Mass. 1995); *United Electrical, Radio and Machine Workers of America v. Maxim, Inc.*, 1990 WL 66578 (D. Mass. May 15, 1990).

Thus, the granting of certiorari in this case would not, as Petitioners contend, eliminate a conflict among the courts. The issue of the correct calculation of WARN Act damages has been thoroughly litigated in the appellate and district courts, and little conflict exists.

B. The Secretary of Labor's 1995 Amicus Brief is not Entitled to Substantial Deference.

Petitioner argues that an amicus brief from 1995 in the *Carpenters* case, setting forth the Secretary of Labor's interpretation of an ambiguous provision of the WARN Act, should be accorded substantial deference by the Court. Deference principles do not apply, however, because Congress did not delegate to the Secretary of Labor any authority to pronounce policy. Rather, Congress authorized the Secretary

of Labor to "prescribe such regulations as may be necessary to carry out this chapter." 29 U.S.C. § 2107(a).

The Secretary's position in 1995 that back pay should be calculated by calendar days is not "necessary to carry out" the Act. Instead, the Secretary advocates a particular public policy choice that affects the extent to which employers will be punished and employees will receive a windfall for an employer's non-compliance with the notice requirements. Whereas the Secretary lacks any authority to proclaim public policy, the Court need not accord any deference to the position. *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. 638, 649 (1990) (finding delegation of administrative authority is a precondition to deference).

Moreover, the only interpretative gap appearing in the legislation concerns the methods by which employers may provide notice of a plant closing. Congress expressly authorized the Secretary to enact regulations filling this gap,[2] and such administrative interpretations have been codified.[3] The absence of any regulation interpreting the back pay provision reveals the Secretary's belief that Congress did not include such policymaking authority in its delegation of duties.[4] Accordingly, because the Secretary lacks authority to pronounce policy choices on the enforcement provisions of the WARN Act, the Court should decline to accord any deference to the previous position advocated by the Secretary.

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[2] 29 U.S.C. § 2107(a).

[3] 20 C.F.R. § 639 et seq.

[4] The absence of any regulation renders inapposite *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988) (permitting Secretary of Health and Human Services to belatedly advocate an interpretation of Secretary's own regulation).

C. The Work Day Approach is Consistent with the Purpose, Provisions and Legislative Intent of the WARN Act.

Petitioners assert that the Ninth Circuit decision merits review by this Court because, they contend, it misconstrues the purpose of the WARN Act. Contrary to Petitioners' assertions, however, the Ninth Circuit did not err in reaching the conclusion that Congress intended to limit damages under the WARN Act to pay employees would have received had they continued to work during the notice period. The Ninth Circuit's holding in this respect is entirely consistent with both the statute's language and congressional intent.

The WARN Act is designed to provide employees with sixty-days warning of plant closings and mass layoffs. 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1(a); 134 Cong. Rec. 15,923 (June 24, 1988). A covered employer must notify all employees or their union, as well as the local government, in writing, of its intention to close a plant or engage in a mass layoff sixty days prior to the action. 29 U.S.C. § 2102(a); *See also United Food and Commercial Worker's Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996); *North Star Steel Company v. Thomas*, 515 U.S. 29, 30 (1995). The fundamental purpose of the WARN Act is to ensure that employees receive advanced notice of their loss of employment due to plant closures and mass layoffs so that they have an opportunity to obtain new jobs or, where necessary, retraining. 20 C.F.R. § 639.1(a) (1994).

Section 2104(a)(1)(A) of the WARN Act provides that if an employer violates the statute's notice provision, the employer must pay each aggrieved employee "back pay for each day of violation," to be computed as not less than the

higher of "(i) the average regular rate received by such employee during the last three years of the employee's employment; or (ii) the final regular rate received by such employee." 29 U.S.C. § 2104(a)(1). The statute also provides that the amount for which an employer is liable should be reduced by "any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. § 2104(a)(2)(A). Damages may also be reduced by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. § 2104(a)(2)(B).

Petitioners contend that the purpose of the WARN Act is to "provide affected employees . . . with sixty days advance notice of a plant closing or mass layoff, in order to provide the best opportunity for the affected government units and unions to assist workers with readjustment assistance and re-employment while the business is still in operation" (Petition at 14). Petitioners argue that the work day approach contravenes the fundamental purpose of the WARN Act because it permits employers to "willingly withhold advanced notice, shut their doors and then pay 'business interruption insurance' to their workers in lieu of notice. . ." (Petition at 16).

It is the *calendar* day approach, however, that contravenes the fundamental purpose of the WARN Act. First, by requiring a violated employer to pay employees substantially more than what they would have earned had notice been given sixty days prior to the shut down, the calendar day approach has an unintended punitive effect on employers who are already struggling to maintain operations. Second, the calendar day approach gives rise to incentives that directly undermine the WARN Act's objective. Requiring employers to pay employees substantially more than they

would have earned during the notice period would compel employers to require employees to report to their places of employment even when their employers are no longer in a position to maintain general operations, thus depriving these employees of the paid time off they otherwise would have had to find new employment. Under these circumstances, although the employees would receive the same pay as that under the work day approach, they would be afforded much *less* of an opportunity to seek new employment and/or job retraining.

Similarly, Petitioners' contention that "forum shopping" will occur as a result of the work day approach has little merit. As discussed previously, five of the last six appellate courts to decide this issue have ruled in favor of the work day approach.

Moreover, Petitioners' contention that an employer suffers no adverse consequences for failure to comply with the notice provisions of the WARN Act is unfounded. As the *Allsteel* court noted, "Employers have an incentive to comply with the WARN Act because they do risk a loss: paying wages to employees but not receiving the benefits of their labor." 9 F.Supp. 2d at 905. Employers also risk paying civil penalties to local governments for failure to provide adequate notice, as well as the payment of attorneys' fees and prejudgment interest if a lawsuit is successfully brought by its former employees. 29 U.S.C. § 2104. Thus, contrary to Petitioners' contentions, there is ample incentive for an employer to comply with the statute, even when damages are limited to working days within the notice period.

II.

THE WORK DAY APPROACH MAKES MORE SENSE

A. The Calendar Days Approach Would Lead to Inconsistent and Anomalous Results

The Ninth Circuit correctly noted that the calendar days approach would lead to anomalous and unfair results. The example set forth by the Court in *Dillard*, and reiterated by the Ninth Circuit, of the absurd result engendered by a calendar days approach compared the damages which should be awarded to employees working different hours during the notice period. 15 F.3d at 1285.[5] Under the calendar days approach to calculation of damages, a full-time employee who works ten hours a day, four days a week, would be entitled to 600 hours worth of pay (ten hours multiplied by sixty days) for a violation of the WARN Act. Another employee who works eight hours a day, five days a week -- the same amount per week as the first employee -- would only be entitled 480 hours of pay (eight hours multiplied by sixty days) for the same violation. A part-time employee who works only ten hours a day, one day a week, also would be entitled to 600 hours of pay (ten hours multiplied by sixty days), 120 hours more than that awarded to the full-time employee. *See Dillard*, 15 F.3d at 1285. As the Court in *Dillard* noted:

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[5] This hypothetical situation was first raised in *North Star Steel* but was rejected by the Third Circuit because the situation was purely hypothetical and because the Third Circuit was unwilling to discuss the method of calculating damages under §§ 2104(a)(1)(A)(i) and (ii). *North Star Steel*, 5 F.3d at 43.

> Under this calendar-day system, not only is the employer severely penalized for choosing to pay damages in lieu of notice, but the full-time employee is treated inequitably, and the part-time employee gets a windfall.

Id.

Such anomalous results would not occur under the work day approach because the employee receives pay only for the hours he or she would have worked during the sixty-day period following a shut-down. The part-time employee, who would have worked only once a week during the sixty-day period, would not receive more pay than the full-time employee.

Petitioners argue that the inequitable results would not occur under a calendar days approach if courts measure damages based on the calculation of overtime rates under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. Petitioners, however, offer no authority for the proposition that the term "regular rate" in the WARN Act is derived from the FLSA or that the method for calculating overtime rates under the FLSA is the method to be used to calculate back pay under the WARN Act. The definition of "regular rate" is not contained in either the WARN Act nor its regulations, and neither the WARN Act or its regulations contain any reference to calculation of damages under the FLSA overtime rates. *See* 29 U.S.C. §§ 2104(a)(1)(A)(i), (ii); 20 C.F.R. § 639.1 *et seq.*

In addition, Petitioners' suggestion that the FLSA regulations calculate the "regular rate" as a daily average over

a five-day week is erroneous. The FLSA's regulation specifically states that "[t] the "regular rate" under the act is a rate *per hour*." 29 C.F.R. §108, 109 (emphasis added). The hourly rate is calculated by dividing a worker's weekly non-overtime pay by the number of hours the employee worked in that week. 29 C.F.R. § 778.109. The language of the WARN Act clearly contemplates calculation by *days* and not by weeks: An employer is liable for "back pay for each *day* of violation. . . ." 29 U.S.C. § 2104(a)(1)(A) (emphasis added). Nor have the courts calculated WARN Act damages with reference to the overtime "regular rate" calculation of the FLSA. *See*, e.g., *Washington*, 860 F.Supp. at 320 (damages calculated by multiplying hourly rate by eight hours by the number of working days in the notice period without reference to FLSA).

Petitioners also argue that the conference report applies a calculation of the $500-a-day civil penalty for violations of the act for each *calendar* day within the notice period, and that the damages for aggrieved employees should be calculated in the same way (Petition at 23). The penalties applied to actions brought by local governments, however, are not available to allegedly aggrieved employees, whose recovery is specifically limited to "back pay for each day of violation." 29 U.S.C. § 2104(a)(1)(A). The statute provides that "[t]he remedies provided for in this section shall be the exclusive remedies for any violation of this chapter." 29 U.S.C. § 2104(b). Because the *civil penalty* is payable to a local government only, and is not based on any work day calculation, there is no alternative but to apply the calendar day approach. With respect to the "back pay" allegedly due employees, however, the working day calculation is not only possible but makes more sense than the calendar day approach. Thus, the penalty provision with respect to local governments is neither applicable nor relevant

to the calculation of back pay under the damages provision available to aggrieved employees.

B. The Work Day Approach is not a Misapplication of the Cannons of Statutory Construction

Plaintiffs also contend that the Ninth Circuit misapplied the cannons of statutory construction by severing the term "back pay" from its context in the phrase "back pay for each day of violation" (Petition at 26). In fact, the Ninth Circuit considered the term "back pay" in the proper context and concluded that the case could not be resolved by "reading the words and looking up their definitions, because a literal reading of the the words and syntex of the statute allows for [adoption of either the calendar day approach or the work day approach]. . . ." 147 F.3d at 1183-84. Because the phrase "back pay for each day of violation" and the legislative history were ambiguous, the Ninth Circuit concluded that the preferable way to resolve linguistic ambiguity is to "evaluate the alternative readings in light of the purposes of statute." *Id.* Thus, the Ninth Circuit did not, as Petitioners contend, "misapply the cannons of statutory construction."

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted

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In The

Supreme Court of the United States

October Term, 1998

ROSELLA E. BURNS, *et al.*,

Petitioners,

vs.

STONE FOREST INDUSTRIES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I.

REPLY TO RESPONDENT'S POINT I: THIS CASE WARRANTS REVIEW BY THIS COURT

A. A Conflict Remains and Results in Inequitable Treatment of Plaintiffs and Conflicting Judicial Interpretations of WARN

Respondent contends that because the split among the circuits on the question presented is asymmetric, there is no conflict. Respondent's Brief at pp. 3-5. First, an asymmetric conflict has never barred review by this Court.[1] Second, and more importantly, Respondent ignores the fact that, based on a full 60 day violation, successful plaintiffs in the Fifth, Sixth, Eighth, Ninth and Tenth Circuits receive approximately 30% less back pay pursuant to the 'work day' calculation of damages[2] than do plaintiffs in the Third Circuit and the district courts in Massachusetts, which have adopted the 'calendar day' approach to calculating damages.[3] This Court should not allow the inequitable distribution of benefits under, and the inconsistent interpretation of this important federal labor law to continue: review and resolution of issues such as this are one of this Court's traditional responsibilities. *See* Sup. Ct. R. 10(a) & (c).

Next, Respondent's contention that the conflict is largely resolved is spurious. As discussed above, the conflict is real and continues

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1. *See, e.g., Musick, Peeler & Garret v. Employers Insurance of Wausau*, 508 U.S. 286, 289 (1993) (5 to 1 split among circuits); *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 219 n.5 (1978) (7 - 1 split among circuits).

2. In addition to the court below, the following federal courts of appeals have adopted the 'work day' approach to calculating damages under WARN: *Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797 (8th Cir. 1998), *cert. denied*, October 5, 1998, *petition for rehearing filed* October 30, 1998 (Docket No. 98-77); *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996); *Saxion v. Titan-C-Mfg.*, 86 F.3d 553 (6th Cir. 1996); *Carpenters Dist. Council v. Dillard Dep't Stores*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

3. *See United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993) (damages due under WARN for each calendar day of the violation); *Sinischalchi v. Shop-Rite Supermarkets, Inc.*, 903 F. Supp. 182 (D. Mass. 1995) (same); *United Electrical Workers v. Maxim, Inc.*, 5 IER Cases (BNA) 629 (D. Mass. 1990) (same).

unabated. Further, as made clear in the Petition at pp. 10-11, despite reaching the same conclusion, the interpretation of the nature and purpose of the Act in the five circuits that have adopted the 'work day' approach has varied significantly[4], thereby guaranteeing confused and conflicting interpretations of other aspects of the Act.

Significantly, other courts considering the nature of damages under WARN are widely divided, turning as much to the Third Circuit's "calendar day" analysis in *North Star Steel, supra* n.3, as to the 'work day' approach adopted by the five other circuit courts, including the court below. For example, *in a different case arising out of the same plant closing that gives rise to this matter*, Respondent argued, as it does here, that WARN damages are compensatory in nature. *Stone Forest Industries, Inc. v. Bowler*, 934 P.2d 1138 (Or. 1997). In deciding the issue of whether WARN damages are wages for purposes of a state workmen's compensation law, the *Bowler* court did not turn to the 'work day' decisions, but rather to the Third Circuit's 'calendar day' approach in *North Star Steel, supra*, and thus concluded that back pay under WARN is not wages but in fact a penalty. *Id.* at 1140-41. In *Conrad v. Charles Town Races*, 1998 WL 394638 (W. Va. 1998), the court also turned to the *North Star Steel* decision in reaching the same conclusion. *See also Georgia-Pacific v. Unemployment Comp. Bd.*, 630 A.2d 948 (Pa. 1993). Another court facing the same issue, however, reached the opposite conclusion, holding that WARN Act damages are wages. *Labor & Industrial Relations Comm. v. Division of Employment Security*, 856 S.W. 2d 376 (Mo. 1993). Similarly, every bankruptcy court faced with the issue has held that WARN damages are remedial in nature and are thus wages. *See, e.g., In re Hanlin*, 176 B.R. 329 (Bankr. D.N.J. 1995); *In re Riker*, 151 B.R. 823 (Bankr. N.D. Ohio 1993); *In re Cargo*, 138 B.R. 923 (Bankr. N.D. Iowa 1992).

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4. Compare *Burns v. Stone Forest Industries Inc.*, 147 F.3d 1182, 1184 (9th Cir. 1998) (WARN "is a wage workers' equivalent of business interruption insurance" designed to provide "a two month uninterrupted income stream facilitating a job search."); *Carpenters, supra* n.2, at 1283-1285 (purpose of the Act is to provide workers with notice of impending employment loss or to compensate employees for wages they would have earned had proper notice been given); *Breedlove, supra* n.2, at 801 (while compensatory in nature, the WARN Act is also quasi-punitive because violating employers must pay wages for work not performed).

Thus, contrary to Respondent's contentions, the conflict at issue here not only results in the inequitable treatment of plaintiffs across the country and gives rise to forum shopping, but also gives rise to inconsistent interpretations of the very purpose of the Act itself which, as demonstrated above, has widespread ramifications and begs immediate clarification.

B. The Secretary of Labor's Position is Entitled to Substantial Deference

Respondent's argument that the Secretary of Labor's position supporting the 'calendar day' approach is not entitled to deference is specious. Respondent's Brief at 5-6. In short, Respondent argues that the Secretary's position is not entitled to deference because the method of calculating damages is not "necessary to carry out" the Act, but rather is a policy choice.

First, if the proper calculation of damages under a federal act is not necessary for its effectuation, nothing is. Second, Respondent's assertion that the broad delegation to the Secretary to prescribe regulations under the Act[5] does not directly encompass a concomitant delegation of policy making authority is a semantical ruse. *Any delegation of authority to promulgate regulations necessarily entails policy considerations in determining the content of the regulations.* Moreover, as set out at length in the Petition at pp. 13-14, this Court has unambiguously held that, where, as here, there is an interpretative gap in statutory language, the resolution of the ambiguity may often be "more a question of policy than [of] law," and an administrative agency's determination of that policy as reflected in its interpretation of the ambiguous provision is entitled to substantial deference. *Pauley v. Bethenergy Mines, Inc., et al.*, 501 U.S. 680, 696 (1991) Thus, the Secretary's position is entitled to substantial deference and warrants review by the Court.

C. The Work Day Approach is Inconsistent with the Purpose, Provisions and Legislative Intent of WARN

Respondent essentially ignores every argument posited by Petitioners and instead argues that the calendar day approach "contravenes the fundamental purpose of the WARN Act" because it has "an unintended punitive effect" that pressures employers to compel employees to report to an idle plant and do nothing so that the employers may escape 'calendar day' liability. Respondent's Brief at pp. 8-9. As Petitioners address at

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5. *See* 29 U.S.C. § 2107(a).

length in the Petition at pp. 24-26, the Act imposes no liability upon employers who are unable to give advanced notice. 29 U.S.C. § 2102(b). *Moreover, where an employer unlawfully withholds notice, there is still no financial incentive to remain open: the employer must bear the additional cost of maintaining, operating and securing a facility for a full 60 days in addition to paying full wages and benefits for 42 days.* Thus, contrary to Respondent's assertions, there is no situation where an employer will have a financial incentive to compel its workers to report to an idle plant. Finally, as repeatedly stated throughout the entire legislative history of the Act[6] and the pendency of this action, the fundamental purpose of WARN is to ensure that employers give notice to their workers. The incentive must, therefore, work to compel employers to give proper notice 60 days *before* the intended plant closing, *not* to pay additional wages *or* to keep the plant open for additional days.

II.

REPLY TO RESPONDENT'S POINT II: THE CALENDAR DAY APPROACH MAKES MORE SENSE

Respondent again largely ignores the arguments advanced by Petitioners and instead simply restates the rationale of the court below. Petitioners rely in full on their discussion of these issues, which are addressed in the Petition at pp. 20-28. Respondent does make two points, however, that warrant brief responses.

First, Respondent argues that, under the 'calendar day' approach, employers will be penalized for choosing to pay damages in lieu of advanced notice. Respondent's Brief at 11. *This should be the case: Congress, in passing the Act, expressly rejected an amendment that would have permitted pay in lieu of notice,* 134 Cong. Rec. 15,926 (1988), *and subversion of Congressional intent should be penalized.*

Next, Respondent alleges that Petitioners offer no authority for the proposition that "the term 'regular rate' in the WARN Act is derived from the [Fair Labor Standards Act.]" Respondent's Brief at 11. A simple reading of the Petition at pp. 21, n.25, and the position of the Secretary of Labor at p. 49a of the appendix to the Petition, reveals that Respondent's assertion is without merit.

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6. *See* Petition at pp. 14-17.

CONCLUSION

For the reasons stated above and in the Petition, the Petition here for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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